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"Against Interpretation"? On Global (Non-)Law, the Breaking-Up of Homo Juridicus, and the Disappearance of the Jurist

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"AGAINST INTERPRETATION"?

ON GLOBAL (NON-)LAW, THE BREAKING-UP OF *HOMO JURIDICUS*, AND THE DISAPPEARANCE OF THE JURIST

Luca Siliquini-Cinelli*

ABSTRACT

This paper investigates the nullification of homo juridicus *and the vanishing of the jurist in relation to the liberal global-order project and the emergence and spread of soft-networked channels of post-national governance. By inquiring into the shift from the individual's* active *will to the sterile* behavioural *schemes prompted by the universalisation of liberalism and economic analysis of social interactions, it will be argued that the jurist and the (rule of) law are no longer needed in a post-national system of rational and mechanic causations. Through an analysis of Susan Sontag's and Josef Esser's accounts for and against the interpretative task, it will be contended that the re-discovery of the*

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anthropological and onto-sociopolitical function of the jurist depends upon the re-affirmation of: (1) the will's oscillation between velle *and* nolle *as constitutive of human uniqueness; (2) the need to interpret* homo juridicus's *will power normativistically, and what this power leads to.*

" . . . in willing and, correspondingly, in not willing, we bring ourselves to light;
it is a light kindled only by willing.
Willing always brings the self to itself"
Martin Heidegger
Nietzsche, [1961] 1991, 51

" . . . the culture of inwardness, the intensification of personal conflicts in human life,
and the pent-up expressive power of its artistic representation is gradually becoming alien to us"
Hans-Georg Gadamer
Philosophical Foundations of the Twentieth Century, [1962] 2008, 111

"Freedom becomes a problem, and the Will as an independent autonomous faculty is discovered,
only when men begin to doubt the coincidence of the Thou-shalt and I-can"
Hannah Arendt
The Life of the Mind, [1971] 1978, Vol II, 63

"Reason is not self-defining"
Paul W. Kahn
Out of Eden, [2006] 2010, 175

". . . according to Christian theology there is only one legal institution which knows neither interruption nor end: hell.
The model of contemporary politics–which pretends to an infinite economy of the world–is thus truly infernal
Giorgio Agamben
The Church and the Kingdom, [2010] 2012, 41

I. INTRODUCTION[1]

I have been criticising the liberal global-order project for some time now.[2] While investigating the structural relationship between the Law & Finance doctrine used by the World Trade Organisation (WTO), the International Monetary Fund (IMF) and World Bank, and the sterile administrative and economic-oriented aspatial *ufficium* of global governance as opposed to that of political government, my efforts have been particularly focused on what I perceive as the two main features of this universalist (non-) dimension: (1) despite what may be argued regarding the accommodating essence of global pluralism,[3] which is ultimately

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1. This paper stems from my participation in the Conference "De-Juridification: Appearance and Disappearance of Law at a Time of Crisis," IVR International Association of Legal and Social Philosophy, UK Branch, held at the Law Department, London School of Economics and Political Science on October 25, 2014, and in the Graduate Legal Research Conference "Divergence and Dissent in Legal Globalization," held by Católica Global Law School, Lisbon, on September 19, 2014. At both conferences I presented the paper entitled *The Age of "Depoliticization" and "Dejuridification" and its "Logic of Assembling": An Essay against the Instrumentalist Use of Comparative Law's Geopolitics*", 37 LOY. L.A. INT'L & COMP. L. REV. 215 (2015) [hereinafter *The Age of "Depoliticization"*].

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2. Luca Siliquini-Cinelli, *The Age of "Depoliticization"*, *supra* note 1; Siliquini-Cinelli, *Hayek the Schmittian: Contextualising Cristi's Account of Hayek's Decisionism in the Age of Global Wealth Inequality*, 24(4) GRIFFITH L. REV. (2015) forthcoming;

3. For an introduction, *see* GLOBAL LAW WITHOUT A STATE 3–28 (Gunther Teubner ed., Dartmouth 1997); More recently, *see* PUBLIC LAW AND POLITICS (Emilios Christodoulidis & Stephen Tierney eds., Ashgate 2008); CONCEPTS OF LAW (Seán Patrick Donlan & Lukas Heckendorn Urscheler eds., Ashgate 2014) [hereinafter CONCEPTS OF LAW]; LAW, SOCIETY AND COMMUNITY (Richard Nobles & David Schiff eds., Ashgate 2014).

Global pluralism's alleged attitude is double-rooted in liberalism's misleading belief in the perpetual inclusive capacity of endless negotiations and in the pluralist branch of the sociological study of democracy, which erupted in the early post-war period and which was aimed at linking realist theories of society with normative models of regulative democracy. Habermas defines it in terms of "sociological enlightenment," in JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, 329–87 (Polity Press 2014) (1992) [hereinafter BETWEEN FACTS AND NORMS].

rooted in the misleading belief that "[g]lobalisation does not imply homogenisation,"[4] the totalising *Oikoumene* is characterised by the uniformity of (non-)politics, (non-) culture, and (non-)legislation in the Western (and in particular, Anglo-American) standardisation of local and particular forms of cultural sensibility[5]—which means that we should rather speak of global (non-)law;[6] (2) the global

4. WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 89 (Cambridge University Press 2000). *See contra* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER (Simon & Schuster 1996); *See also* what was pointed out by Bowden and Seabrooke, namely that "global standards of market civilization are based on a global normalization of liberal positivism," in GLOBAL STANDARDS OF MARKET CIVILIZATION 10 (Brett Bowden & Leonard Seabrooke eds., Routledge 2006) [hereinafter GLOBAL STANDARDS]. For a recent point of view on global order issues, *see* HENRY KISSINGER, WORLD ORDER (Penguin 2014).

5. Dyzenhaus' claim that Rawls' homogenous society "involves, by and large, getting rid of pluralism [in politics]," should be investigated within this perspective. *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY 231 (Clarendon 1991). This passage was reprinted, in part, in "Putting the State Back in Credit," in THE CHALLENGE OF CARL SCHMITT 75–91 (Chantal Mouffe ed., Verso 1999) [hereinafter CHALLENGE OF CARL SCHMITT], where Dyzenhaus adds that the discipline of public reason wanted by Rawls "is supposed not so much to displace politics as to suppress it altogether," at 84; See also Žižek's notion of "post-politics" in *Carl Schmitt in the Age of Post-Politics* in CHALLENGE OF CARL SCHMITT, *id.* at 30. François Ost is of the same view, as it emerges when he argues that "globalised law . . . results from a much more radical perspective of transnational penetration, the result of more-or-less spontaneous convergence of national laws seeking to align themselves with standards and models that are dominant or seductive," in *Law as Translation* in THE CULTURE AND METHOD OF COMPARATIVE LAW 69–86, at 77 (Maurice Adams & Dirk Heirbaut eds., Hart Publ'g, 2014). For an introduction, *see* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (Princeton Univ. Press 2008) [hereinafter LIBERALISM IN ITS PLACE]. For a historically contextualised perspective, *see* CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 214–94 (Gary J. Ulmen trans., Telos 2006) (1950) [hereinafter *NOMOS* OF THE EARTH]; Gary J. Ulmen, *Pluralism Contra Universalism*, 31:5 SOCIETY 32 (1994).

6. The term 'global (non-)law' has also been used by Marc Amstutz in *Global (Non-)Law: The Perspective of Evolutionary Jurisprudence* 9 GERMAN LAW JOURNAL 465 (2008).

In this regard, at first glance it might seem that we already live in the "community" for whose coming Agamben argued more than twenty years ago after the fall of the "bipolar system" and in which neither commonality nor identity is a condition of belonging because "[t]he coming being is whatever being." Yet upon closer look, it emerges that such a community is yet to come as the formation of such a community requires an absolute—that is, exceptional and sovereign—*act* of simultaneous 'potentiality' and 'actuality' (a *destituent potential*, as Agamben defines it). The limit of this solution, however, is that its key features are purely metaphysical – and Agamben is aware of that. *See*

order scheme may not be considered a territory in spatio-ontological terms and, consequently, there is no need in it for a *nomos* in terms of "division", "allocation", and "appropriation" (*Nahme*) of rights, interests, obligations, and duties; that is to say, by being made up of (non-)boundaries, global (non-)law rejects law's anthropological and ontological need for a tangible *signature*.[7] The unification of these two components leads, I maintain, to the nullification of the Schmittian sovereign, exception, and concept of the political.

Within the same perspective, the present contribution argues that in our dehumanised global age, legal interpretation will be less-frequently required because the jurist's anthropological and onto-sociopolitical function will increasingly no longer be needed. This is so, I will contend, because in the post-national setting[8]—in

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GIORGIO AGAMBEN, THE USE OF BODIES 269–73 (Adam Kotso trans. Stanford University Press 2016); *See also* GIORGIO AGAMBEN, THE COMING COMMUNITY 1, 67 (Michael Hardt trans., Univ. Minn. Press 2013) (1990) [hereinafter THE COMING COMMUNITY]. *See also* AGAMBEN, MEANS WITHOUT END (Vincenzo Binetti & Cesare Cesariano trans., Univ. Minn. Press 2000) (1992); Agambem, *Special Being* in PROFANATIONS 55–60 (Jeff Fort trans., Zone Books 2007); AGAMBEN, THE SACRAMENT OF LANGUAGE 69–72 (Adam Kotso trans., Stanford Univ. Press 2010). For a theological inquiry into the managerial and administrative paradigm of the *oikonomia, see* AGAMBEN, THE KINGDOM AND THE GLORY (Lorenzo Chiesa & Matteo Mandarin trans., Stanford Univ. Press, 2011). The reasons why this paradigm found a decisive ally in the imperialist age were queried by HANNAH ARENDT in THE ORIGINS OF TOTALITARIANISM 123–302 (Harvest Books 1973) [hereinafter ORIGINS OF TOTALITARIANISM].

Not surprisingly, in trying to shape the political task of our generation, Kahn correctly urges us to "think critically about our own claims for universal norms", a necessity due to the fact that "Western aspirations for a single global order are not universally accepted." KAHN, *supra* note 5, at 2. For a more juridical account, *see* WILLIAM E CONKLIN, STATELESSNESS (Hart Publ'g 2014). *See also* FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW (Cambridge Univ. Press 2013).

7. Luca Siliquini-Cinelli, *Imago Veritas Falsa*: *For a (Post-)Schmittian Decisionist Theory of Law, Legal Reasoning, and Judging*, 39 AUSTRALIAN J. LEGAL PHIL. 118 (2014) [hereinafter *Imago Veritas Falsa*]; Siliquini-Cinelli, *The Age of "Depoliticization"*, *supra* note 1.

8. Scholarship on post-national issues is seemingly endless. Any investigation on this topic should at least consider GOVERNANCE WITHOUT GOVERNMENT (James N. Rosenau & Ernst-Otto Czempiel eds., Cambridge Univ. Press 2009); NICO KRISCH, BEYOND CONSTITUTIONALISM (Oxford Univ. Press 2012); BEYOND TERRITORIALITY (Peer Zumbansen, Günther Handl &

which (non-)humans neutrally *behave* rather than willingly *act* and in which cultures are no longer "mapped" through the (legal) traditions that express them via definition of identities—the political relationship between the law and those it tries to protect by imposing respect for itself and/or stimulating that respect is neutralised. What we are witnessing is, then, the breaking up of *homo juridicus* as a type of *homo* whose performative volitions need the law's normative *placet*.

According to Alain Supiot,[9] *homo juridicus* is a type of *homo* characterised by "reason"[10] and who acquires and protects his/her

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Joachim Zekoll eds., Brill 2012); George Pagoulatos & Loukas Tsoukalis, *Multilevel Governance* in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 62–75 (Erik Jones, Anand Menon & Stephen Weatherill eds., Oxford Univ. Press 2012) [hereinafter OXFORD HANDBOOK]; Vivien A. Schmidt, *Democracy and Legitimacy in the European Union* in OXFORD HANDBOOK, *id.* at 661–75; Adrienne Héritier, *Policy Effectiveness and Transparency in European Policy Making* in OXFORD HANDBOOK, *id.* at 676–89; ADRIENNE HÉRITIER, POLICY-MAKING AND DIVERSITY IN EUROPE (Cambridge Univ. Press 1999); Héritier, *New Modes of Governance in Europe: Increasing Political Capacity and Policy Effectiveness?* in THE STATE OF THE EUROPEAN UNION 105–26 (Tanja A. Börzel & Rachel A. Cichowski eds., Oxford Univ. Press 2003); Héritier, *New Modes of Governance in Europe: Policy-Making Without Legislating?* in COMMON GOODS 185–207 (Adrienne Héritier ed., Rowman & Littlefield Pubs 2002); Adrienne Héritier & Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance* 28 J. PUB. POLICY 1 (2008); Gráinne de Búrca, Robert O. Keohane & Charles F. Sabel, *Global Experimentalist Governance*, New York University Public Law and Legal Theory Working Papers, #485 (2014); DEMOCRACY AND CRISIS (Benjamin Isakhan & Steven Slaughter eds., Palgrave MacMillan 2014); TRANSNATIONAL GOVERNANCE (Michael Head, Scott Mann & Simon Kozlina eds., Ashgate 2012); EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION (Charles F. Sabel and Jonathan Zeitlin eds., Oxford Univ. 2010) [hereinafter EXPERIMENTALIST GOVERNANCE IN THE EU]; RULING THE WORLD (Jeffrey L. Dunoff & Joel P. Tratchman eds., Cambridge Univ. Press 2009); GLOBAL STANDARDS, *supra* note 4; CRITICIZING GLOBAL GOVERNANCE (Markus Lederer & Philipp Müller eds., Palgrave Macmillan 2005); GLOBALIZATION AND LAW FROM BELOW (Boaventura de Sousa Santo & César Augusto Rodriguez-Garavito eds., Cambridge Univ. Press 2005); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton Univ. Press 2000); GLOBALIZATION AND GOVERNANCE (Aseem Prakash & Jeffrey A. Hart eds., Routledge 2000).

9. ALAIN SUPIOT, HOMO JURIDICUS (Saskia Brown trans., Verso, 2007). *See also* Maksymilian Del Mar, *Book Review: Homo Juridicus: On the Anthropological Function of Law*, 5 LAW, CULTURE AND THE HUMANITIES 325–29 (2009); Robert Knox, *Homo Juridicus: On the Anthropological Function of Law*, 17:2 HISTORICAL MATERIALISM 286–99 (2009); *See also* Peter Goodrich,

own humanised identity by performing within his/her own biological and symbolic dimensions. The law plays a pivotal anthropological role in this process because, Supiot claims, it helps *homo juridicus* to differentiate him/herself from what s/he is "not" and "should not be." Supiot seems to realise that Kojéve's Hegelo-Marxist post-historical (that is, animal) condition, with its apolitical and legally neutral essence and unstable non-substance, is what would remain should the anthropological function of the law not meet this challenge. In addition to several aspects of labour law, of which Supiot is a leading scholar, the so-called "civilising mission" of the contract is also investigated throughout his book in support of his claim.

Supiot's account, while fascinating, is affected by a primary conceptual paradox that, unfortunately, weakens it. Indeed, while warning us against the dehumanising trend of the mechanical global-order project, Supiot expends much effort in criticising the model of the individual promoted by the schemes of standard economic analysis, according to which people do not act, but behave. Yet, as he admits while quoting Dumont, "in reality actual men do not *behave*; they *act* with an idea in their heads . . . ."[11] Although Supiot correctly warns us against the "humanitarian" façade of globalisation,[12] he seems to underestimate this existential feature of mankind, and, by arguing for the possibility of a *homo*

Interstitium and Non-Law in METHODS OF COMPARATIVE LAW 213, 213 (Pier Giuseppe Monateri ed., Edward Elgar 2012) [hereinafter METHODS OF COMPARATIVE LAW]; Goodrich, *Law's Labour's Lost* 72 MODERN L. REV. 296 (2009).

10. SUPIOT, *supra* note 9, at ix.

11. *Id.* at 99. David Nelken is of the same idea, as it emerges when he notes that "social life consists of action rather than mere behaviour," in *Puzzling Out Legal Culture: A Comment on Blankenburg* in COMPARING LEGAL CULTURES 69–92, at 75 (David Nelken ed., Darthmout 1997) [hereinafter COMPARING LEGAL CULTURES].

12. On this, *see also* KAHN, *supra* note 5, at 135–36. The fact that Kahn himself, who is director of a worldwide centre for human rights, claims that "the human rights movement [is] a new form of global politics—the liberal politics of reason—[that] has virtually nothing to say" is truly astounding. *Id.* at 136.

juridicus who reasons, he actually offers a neo-Kantian notion of "persons"[13] that supports both economic models of rational *behaviour* and the dehumanised essence of liberalism.[14] The contemporary post-national globalising trend, and the "irresistible progress of technology"[15] that underpins it, may therefore paradoxically find a valuable ally in Supiot's account.

The definition that best addresses *homo juridicus*'s nature is, I contend, quite different. As I shall explain in Section II, *homo juridicus* is, to me, a type of *homo* who *acts* instead of *behaving* and does so because of the performative instances of his/her willing ego rather than because of some interest- or reason-oriented scheme of social interaction. I argue this because our *existential* power to (per-)form our volitions is rooted in the *essence* of the conflict that takes place within our sovereign power-to-will while we are deciding both "for" and "against" a future project (as Plotinus and Hegel would agree). Hence, the *act* of (per-)forming our choices is what defines both the essence of willpower and the existential uniqueness of mankind. This was clear to Augustine who, in *On the Free Choice of the Will*,

13. As we shall see in due course, according to Kant, beings who *act* under the maxim of the "categorical imperative" are "rational beings . . . called persons." *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 55 (Lewis White Beck trans, Library of Liberal Arts 1997) (1785).

14. The relationship "reason-law" has been understood since philosophy began to be constitutively involved with the law—that is, since Socrates' trial and Plato's meeting with Dionysius in Sicily. The rationalisation of society brought about by modernity gave it new life. Any investigation on its modern essence should at least deal with HANS BLUMEMBERG, THE LEGITIMACY OF THE MODERN AGE (Robert M. Wallace trans., MIT Press 1983) (1966); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, Vols I and II (Polity Press 2004, 2006) (1981)[hereinafter THEORY OF COMMUNICATIVE ACTION]; HABERMAS, ON THE LOGIC OF SOCIAL SCIENCES (Shierry Weber Nicholsen & Jerry A. Stark trans., MIT Press 1994) (1988) [hereinafter LOGIC OF SOCIAL SCIENCES]; HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 3; ANTHONY W. PRICE, CONTEXTUALITY IN PRACTICAL REASON (Oxford Univ. Press 2008); NEIL MACCORMICK, LAW, STATE AND PRACTICAL REASON (series) (Oxford Univ. Press 1999–2011); THE OXFORD HANDBOOK OF THINKING AND REASONING (Keith J. Holyoak & Robert G. Morrison eds., Oxford Univ. Press 2012); LUC J. WINTGENS, LEGISPRUDENCE: PRACTICAL REASON IN LEGISLATION (Ashgate 2012); *see also infra* note 51.

15. SUPIOT, *supra* note 9, at 39.

explained how in his youth he turned from reason to will to form his character and who, as Arendt has correctly pointed out, believed that "the freedom of the Will draws exclusively on an inner power of affirmation or negation that has nothing to do with any actual *posse* or *potestas*."[16] Framed in these terms, *homo juridicus* is a type of *homo* characterised not by the unspontaneous potentiality of reason (or desire), but by the immanence and freedom of the *volo me velle*, which makes him/her decide "for" and "against" something or someone according to the power of affirmation or negation of the self. If the above is correct, the authority of the jurist's activity of *jus-dicere* (or rule-telling) is then rooted in the sociopolitical need to, first, normativistically interpret the individual's *active* will and then, through the formulation of (and answer to) a *quaestio juris*, hold "that" individual (and, thus, as we shall see, man *qua* man as opposed to "Man") accountable for the consequences of his/her sovereign choice.

This type of willing *homo,* and thus the existential need for having a legal expert who *actively* interprets and encapsulates the meaning of his/her doing within law's regulative instances,[17] are disappearing. Put bluntly, this means that the jurist is disappearing. This was also true, at least in part, in the civil law tradition during the modern era, when, with the exception of Germany, the constructivist, political *dicta* of the Leviathan as absorbing *magnum-artificium* (or *magnus homo*) determined the victory of the *ratione Imperii* over that of the *imperio rationis* and displaced

16. HANNAH ARENDT, 2 THE LIFE OF THE MIND 88 (Harcourt 1978) (1971) [hereinafter 2 LIFE OF THE MIND]. Elaine Pagels carefully investigates the role that Augustine played in changing the Christian perspective on freedom and willpower in ELAINE PAGELS, ADAM, EVE, AND THE SERPENT 78–150 (Vintage Books 1989) (1988).

17. *See* the notion of "interpretation" in the OXFORD ENGLISH DICTIONARY, according to which "interpretation is the *action* of explaining the meaning of something." Emphasis added; *see also* STEFANO BERTEA, THE NORMATIVE CLAIM OF LAW (Hart Publ'g 2009).

the jurist from the picture (*auctoritas non veritas facit legem*).[18] On the contrary, in our (post-post-modern or neorealist?[19]) globalised age, both the willing *homo juridicus* and the jurist make no appearance because of the working scheme of the global "civil society," which is an apolitical and legally neutral soft-networked worldwide web of more-or-less autonomous associations that openly binds (non-)humans[20] together in matters of "common" concern. This intangible and illimitable web works according to the destructuralised mechanisms of what is known as post-national governance (PNG).

What I claim in this paper cannot be evaluated without a knowledge of how soft-networked and intangible schemes of PNG work. Unfortunately, a full description of them is beyond the parameters of this contribution. It will have to suffice to highlight that the PNG model is that of a neutral administration of (non-)human affairs that is ultimately aimed at transcending the forms of politics and law through which the modernisation of the world was achieved (and unsuccessfully protected) over the last two centuries. The term "soft-networked interaction" basically signifies that every level of governance "spontaneously" collaborates with each other by operating on an equal basis of "output" legitimation and accountability (the so-called Roman strategy[21]).

I will return to PNG's features in Section II. What should be noted now is that, law being a phenomenon that precedes the state, "legal hybridity" is a fascinating term that the (globalised) jurist has used to, or at the very least tries to, overcome the limits that affect the recursive thinking of the neo-Kantian debate on the

18. I discussed this in Siliquini-Cinelli, *Imago Veritas Falsa*, *supra* note 7. *See also* TIMOTHY MURPHY, THE OLDEST SOCIAL SCIENCE? (Oxford Univ. Press 1997); JAMES GORDLEY, THE JURISTS (Oxford Univ. Press 2013).

19. *See* FRANCA D'AGOSTINI, REALISMO? (Bollati Boringhieri 2014).

20. GIORGIO AGAMBEN, THE OPEN (Kevin Attell trans., Stanford Univ. Press 2004) (2002).

21. LUUK VAN MIDDELAAR, THE PASSAGE TO EUROPE 223, 229, 252–73 (Liz Waters trans., Yale Univ. Press 2013) (2009).

nature of the law (see Austin, Kelsen, Hart, Raz, and, in part, Dworkin) and thus makes sense of his/her *essence* in this liquid scenario.[22] Unfortunately, while trying to face this wave of juridical nihilism (in which s/he became "an unwitting tool, a link in a chain of events that [s/he does] not see as a whole"[23]) by accommodating his/her functionalist anthropological and sociopolitical *existential* needs, the jurist has made (at least) two terrible mistakes. First, the jurist did not pay enough attention to the recursive motion of the strategy followed by the liberal global-order project, whose "occult" essence cannot be revealed without a comparative inquiry between, on the one hand, liberal individualism and its belief in the never ending potentiality of reason and, on the other hand, the aesthetic, subjected occasionalism and metaphysics of absolute individualism[24] that characterised the romantic attitude and that were aimed at opening the "self" to a world of illimitable and interchangeable (non-)realities.[25] Second, in trying to take back the role of which

22. For an introduction, *see* KEITH C. CULVER AND MICHAEL GIUDICE, LEGALITY'S BORDERS (Oxford Univ. Press 2010). The discussion undertaken at the conference "*Stateless Law: The Future of the Discipline*," which was held at McGill University in September 2012, has provided useful insights on this: *see* STATELESS LAW, EVOLVING BOUNDARIES OF A DISCIPLINE (Helge Dedek & Shauna Van Praagh eds., Ashgate 2015). On the notion of "liquid society," *see*, in addition to Zygmunt Bauman's works, LIQUID SOCIETY AND ITS LAW (Jirí Pribán ed., Ashgate 2007).

23. FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY 63 (Routledge 2013) (1973, 1976, 1979). *See also* NATALINO IRTI, NICHILISMO GIURIDICO (Laterza 2005). I share Roger Cotterrell's belief that "the juristic issue is how the idea of law can survive in the socio-historic conditions it faces," in *The Jurist's Conscience: Reflections Around Radbruch*, THE ANXIETY OF THE JURIST 13–26, at 24 (Maksymilian Del Mar & Claudio Michelon eds., Ashgate 2013).

24. Think, for example, of Fichte's absolute ego and philosophy of science, and Schelling's philosophy of nature and notion of external reality.

25. CARL SCHMITT, POLITICAL ROMANTICISM (Guy Oakes trans., MIT Press 1986) (1919); SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM (Gary L. Ulmen trans., Greenwood Press 1996) (1923); SCHMITT, HAMLET OR HECUBA (David Pan & Jennifer Rust trans., Telos 2009) (1956); PAUL DE MAN, THE RHETORIC OF ROMANTICISM (Columbia Univ. Press 1984); DE MAN, ALLEGORIES OF READING 135–301 (Yale Univ. Press 1979). *See also* HANNAH ARENDT, THE HUMAN CONDITION 38–49 (Univ. of Chicago Press 1998) (1958) [hereinafter HUMAN CONDITION]; finally, *see* LAW AS POLITICS (David

the nation-state, with the aforementioned exception of Germany, has deprived him/her, the jurist has instrumentally supported the global-order plan by using the same Legendrian "logic of assembling"[26] through which the Leviathan has neutralised the authority of legal reasoning and that inevitably implies an *a priori* deconstruction.

The dissolution of the nation-state and of its sovereignty as a principle of political and juridical unity has provoked several reactions. Two of them are of particular interest here because they have led to two completely opposite scenarios—the justification and the total displacement of the jurist's function. The first scenario, aimed at protecting the state by making sense of its legal authority in the globalised network, makes a claim for the empirical impossibility of fully achieving the form of the nation-state. What should be achieved, it posits, is rather what should be called the "cosmopolitan" state. Given that globalisation, in Glenn's words, "represents the inevitable challenge to the instruments of closure of the contemporary state,"[27] the only form of state that may accommodate civil society's pluralistic instances is that of a cosmopolitan (non-)Leviathan. This is so because the

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Dyzenhaus ed., Duke Univ. Press 1998); JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM 46–57 (Cambridge Univ. Press 1999).

26. PIERRE LEGENDRE, L'OCCIDENTE INVISIBILE (*CE QUE L'OCCIDENT NE VOIT PAS DE L'OCCIDENT*) 41 (Paolo Heritier trans, Edizioni Medusa 2009) (2004). My translation. *See* Siliquini-Cinelli, *The Age of "Depoliticization"*, *supra* note 1.

On the relevance of Legendrian thought to legal discourse, *see* LAW AND THE UNCONSCIOUS (Peter Goodrich trans. & ed., Palgrave MacMillian 1997); LAW AND THE POSTMODERN MIND (Peter Goodrich & David G. Carlson eds., Univ. of Mich. Press 1998); LAW, TEXT, TERROR (Peter Goodrich et al. eds., Routledge 2006).

27. H. PATRICK GLENN, THE COSMOPOLITAN STATE 165 (Oxford Univ. Press 2013). Glenn goes further and clarifies that "[f]actual globalization not only surpasses the institutional capacities of state hierarchies, it also transcends the physical boundaries of states," *id.* at 170. *See also id.* at 172–80 for a compelling summary of the various approaches to cosmopolitism. In particular, *see* Held's argument for a "cosmopolitan citizenship" in DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER (Stanford Univ. Press 1996).

so-called "internal aspect" of socio-legal rules,[28] and thus their rational acceptance by the participants in the soft-networked realm, would benefit from this shift. More precisely, although Glenn admits that "the cosmopolitan theory has not produced easily identifiable results,"[29] he nevertheless suggests that, in light of how the "cosmopolitan character of the contemporary state also explains much of its present operation,"[30] "[o]ur thinking of the contemporary state can . . . be facilitated by awareness of its cosmopolitan character".[31] A similar claim is made by William Twining, who argued for the urgent necessity of a "cosmopolitan discipline of law,"[32] and by Paul Berman, who, in describing the limits of sovereigntist territorialism and universalism, opted for a *tertium comparationis*, namely "cosmopolitan pluralism."[33] All these views share some elements with those aimed at uniting the benefits of inter-connected channels of PNG with the *ante-factum* legitimation and *post-factum* accountability working logic of those forms of progressive constitutionalism[34] in which the state is not a mere "bystander" that observes what other private, public, and

28. It was Hart who coined the notion of the positivistic and state-oriented "internal aspect of law," by which he meant that law's social recognition (also) depends on its appeal to reasonable acceptance. *See* H.L.A. HART, THE CONCEPT OF LAW 203 (Oxford Univ. Press 2012) (1961). *See also* Adam Perry, *The Internal Aspect of Social Rules*, 35 OXFORD J. LEGAL STUD. 283 (2015).

29. GLENN, *supra* note 27, at 172.

30. *Id.* at 291. It is noteworthy that, despite what may be contrarily thought, a similar point was made decades ago by Schmitt in *Ethic of State and Pluralistic State* in CHALLENGE OF CARL SCHMITT, *supra* note 5, at 195–208. *See also* ELLEN KENNEDY, CONSTITUTIONAL FAILURE 140–44 (Duke Univ. Press 2004); DYZENHAUS, *supra* note 5.

31. GLENN, *supra* note 27, at 291.

32. WILLIAM TWINING, GENERAL JURISPRUDENCE 3 (Cambridge Univ. Press 2009).

33. PAUL BERMAN, GLOBAL LEGAL PLURALISM 10–1 (Cambridge Univ. Press 2012). *See also id.* at 12–3. For a recent account of Berman's inquiry, *see* Michael Giudice, *Global Legal Pluralism: What's Law Got to Do With It?*, 34:3 OXFORD J. LEGAL STUD. 586 (2014).

34. Luca Siliquini-Cinelli, *Legal Pluralism and Progressive Constitutionalism: An Introduction to the South African Challenge for Post-National Governance*, 2 J. COMP. L. IN AFRICA 1 (2015). *See also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

hybrid actors achieve and/or fail to achieve; rather, the state is seen as a political "ally", or an entrepreneur[35]—as a co-protagonist risk-taker.

The second reaction has instead led to the complete rejection of any forms of legal authority as expressed by the social contract theory (Hobbes, Locke, Rousseau, Kant). This is done with the aim of establishing, through the adoption of a post-structuralist theory of unconventional legitimation, the beginning of a new *ontological anarchism* that "contends that the law has no binding claim on our obedience"[36] by refusing "the founding of the law [and] invok[ing] . . . the ethical and political disruption of all legal authority."[37] Yet, notwithstanding this fascinating claim that anarchy "is the very condition for doing politics in an ethical way,"[38] the proposed model of society can never be achieved. This is so because, once the absolute foundations of normative power are neutralised through the "deconstruction or displacement of . . . essential identities,"[39] the new order would depend entirely upon the belief in "the autonomous, voluntary and cooperative relationships that are found in everyday social relations"[40] which, to serve the anarchic cause, would be extended to utopic limits.

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35. MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE (Anthem Press 2013).

36. Saul Newman, *Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience*, 21 GRIFFITH L. REV. 307, 315 (2012). *See also* the whole Volume 21, No. 2 of the GRIFFITH LAW REVIEW entirely dedicated to *Law and Anarchy: Legal Order and the Idea of a Stateless Society*.

37. *Id.* at 321.

38. *Id.* at 327.

39. *Id.* at 323.

40. *Id.* at 321. This becomes even more evident when anarchists themselves admit that "[i]f an anarchist ends up in front of a judge, presumably [s/he] will want a good lawyer," *id.* at 327. In this sense, a true form of real anarchism is that which took place in Italy in the 1970s, when the terrorists of the so-called *Brigate Rosse* refused any form of legal assistance during the several trials in which they were condemned. This led to a very delicate situation in which the rule of Article 24 of the Italian Constitution (according to which legal defence is an inviolable right) could not be complied with. The existential crisis of the judicial system and the rule of law culminated in the threatening (and sometimes killing, such as in the case of Advocate Fulvio Croce, in Turin) of the lawyers who were "forced" to provide legal assistance to the "red" activists. The more

Delving into this debate, this paper proposes an alternative strategy through which one can (try to) challenge the threat posed to the sociopolitical need for and authority of the jurist in the current soft-networked globalised scenario. My claim, which stands in evident opposition to both liberalism's mechanic rationalisation of human conduct[41] and Tamanaha's belief that law "has no essence,"[42] is that for the jurist to defeat the current nihilism which affects his/her role, a metaphysico-ontological turn must be made: from the (non-)human who rationally *behaves* according to scientific schemes of social interactions to the human who willingly (and politically) *acts* and whose decisions must be normativistically interpreted. Only through the individual's re-appropriation of his/her willpower—that is, the power to decide both "for" and "against" different possible scenarios—will the jurist's *jus-dicere* come back to *act* as a *medium* between society's anthropological need for sociopolitical order and coordination, and law's performative instances.

To put it differently, the *decisive* anthropological and onto-sociopolitical relationship between *jus-dicere* and the individual's *active* will is what jurists should look for while trying to visualise and make sense of both (the rule of) law's organising ideal and its claim to regulative power in a globalised era characterised by

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accurate and accessible description of what happened in those years is to be found in GIORGIO GALLI, PIOMBO ROSSO (Baldini Castoldi Dalai 2007). On the unavoidable intrinsic "evilness" of mankind, *see*, in addition to Baudelaire's and Dostoyevsky's works, PAUL W. KAHN, OUT OF EDEN (Princeton Univ. Press 2010) (2006) [hereinafter OUT OF EDEN]; SUSAN NEIMAN, EVIL IN MODERN THOUGHT (Princeton Univ. Press 2002); MICHEL FOUCAULT, MADNESS AND CIVILIZATION (Vintage Books 1988) (1961). For a different notion of evil in terms of a dehumanised and "banal" consequence of the rise of bureaucratic schemes of administration, *see* HANNAH ARENDT, EICHMANN IN JERUSALEM (Penguin Books 2006) (1963).

41. CARL SCHMITT, POLITICAL THEOLOGY 63 (George Schwab trans., Univ. of Chicago Press 2005) (1922, 1934); KAHN, LIBERALISM IN ITS PLACE, *supra* note 5 and OUT OF EDEN, *supra* note 40, at 53–60; KAHN, POLITICAL THEOLOGY 175 (Columbia Univ. Press 2012) [hereinafter POLITICAL THEOLOGY].

42. BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 193 (Cambridge Univ. Press 2001).

multiple and conflicting non-exclusive and non-supreme claims of authority[43] (and in which, as a consequence, the very essence of a primordial and supreme *constitutive* power is nothing but obsolete).[44] I believe that the only way through which the jurist may effectively take back the leading role of which the universalisation of liberalism (and in particular the idea that governments should build or reform their institutions to regulate economic activities according to rational global standards determined by outsiders) has deprived him/her is the re-affirmation of the immanence of the *decisive* and *active* function of people's willing faculty and of the corresponding need to make sense of it in normative terms. Strictly speaking, this means that we, as lawyers, should effect a "conceptual shift" and opt for a Heideggerian backward method of comprehension that will lead us to understand the *essential* authority of (the) law by inquiring into and exploring the *existential* authority of the jurist, and not vice versa.

This is what this paper tries to do by addressing the essence of legal interpretation (and, thus, at least in part, legal hermeneutics) through the analysis of two opposite accounts: Susan Sontag's essay "Against Interpretation" and Josef Esser's defence of the interpretative task in his *Vorverständnis und Methodenwahl in der Rechtsfindung*.[45] In particular, Section II investigates the relationship between the individual's sovereign will and the role of

43. Bas van der Vossen, *Legitimacy and Multi-Level Governance* in NEW WAVES IN PHILOSOPHY OF LAW 233–53 (Maksymilian Del Mar ed., Palgrave Macmillan 2011); Nicole Roughan, *The Relative Authority of Law: A Contribution to "Pluralist Jurisprudence"*, *id.* at 254–74; EMMANUEL MELISSARIS, UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM (Ashgate 2009).

44. A comparison between the aforementioned scheme of "Roman strategy," which characterises PNG's system of *post-factum* legitimation and accountability, and Robespierre's "Immortal Legislator" as a perpetual source of authority still needs to be done. *See* HANNAH ARENDT, ON REVOLUTION 176–77 (Penguin Books 2006) (1963).

45. Respectively, SUSAN SONTAG, AGAINST INTERPRETATION AND OTHER ESSAYS (Picador 2001) (1966), and JOSEF ESSER, PRECOMPRENSIONE E SCELTA DEL METODO NEL PROCESSO DI INDIVIDUAZIONE DEL DIRITTO 112–37 (Salvatore Patti & Giuseppe Zaccaria trans., ESI 1983) (1972).

the jurist in providing it with a legal meaning along with the current displacement of both, caused by the universalisation of liberalism; in Section III Sontag's and Esser's inquiries will be compared; concluding remarks will appear in Section IV.

II. THE LIBERAL GLOBAL-ORDER PROJECT: FROM *ACTION* TO *BEHAVIOUR*

What this paper claims could be summarised as: that law's *essence* should be inferred from its *existential* force—that is, from the jurist's function. As a comparatist, I fully agree with Geoffrey Samuel when he says that the considerable body of work produced by jurists on the definition and nature of law is "less helpful" to the comparatist "than might first appear."[46] Nonetheless, it is precisely my comparative experience that tells me that the law can keep its regulative promises only if the jurist can count on it to interpret *decisively* the *active* power-to-will of *homo juridicus* whilst inferring the rule from the norm, as Paul suggested.[47] This is why, as I will argue in Section III, legal interpretation is the canon of *jus-dicere*, that is, "to tell what is the law."[48] Importantly, this is why, as Schmitt, Derrida, and, more recently, Agamben and Kahn have persuasively argued while inquiring into the political sin of legal positivism and liberalism, the law is the product of both the *norm* and the *decision*.

The nullification of the individual's will brought about by (the universalisation of) liberalism[49] and the ideal of a self-regulating

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46. Geoffrey Samuel, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences* in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 34–77, at 36 (Mark Van Hoecke ed., Hart Publ'g 2004) [hereinafter EPISTEMOLOGY AND METHODOLOGY].

47. *Cf. Digest*, 50, 17, I: *Regula est quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat*. This reciprocal need leads to the (unanswerable) question of whether it is humans who control (and need) law, or law that controls (and needs) humans (*non sub homine sed sub* [*Deo et*] *lege*). *See also infra* note 58.

48. Siliquini-Cinelli, *Imago Veritas Falsa*, *supra* note 7.

49. Kolakowski correctly spoke of the "self-destructive potential of liberalism" while describing "the process by which the extension and consistent

(global) society in which (non-)humans *behave* according to "mathematical symbols of economic equations, which require persons to be grasped simply as contracting units,"[50] renders the activity of *jus-dicere* obsolete. To understand this dissolving phenomenon completely entails that we first understand that to assess human *action* in terms of *rationality* is misleading because to speak of "rational choice"[51] or "purposive-rational action [in which] behaviour is guided by technical rules"[52] is nothing but an oxymoron. If reason, in Kahn's words, "is not self-defining," it is

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application of liberal principles transforms them into their antithesis." *See*, respectively, *The Self-Poisoning of the Open Society* and *Irrationality in Politics* in LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 162–75, at 162–163 and 192–203 (Univ. of Chicago Press 1990).

50. SUPIOT, *supra* note 9, at 96. The behavioral model of social interaction recalls Nietzsche's "mathematical faith" in a world "reduced to a mere exercise for a calculator." *See* FRIEDRICH NIETZSCHE, THE GAY SCIENCE 335 (Walter Kaufmann trans., Vintage Books 1974) (1882). The fact that the global governance framework is administrated through "indicators" is a powerful testament to this. *See* GOVERNANCE BY INDICATORS (Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., Oxford Univ. Press 2012).

On how the law and economics approach examines (non-)legal rules as a working system, *see* Francesco Parisi & Barbara Luppi, *Quantitative Methods in Comparative Law* in METHODS OF COMPARATIVE LAW, *supra* note 9, 306–16; Parisi & Luppi, *Comparative Law and Economics: Accounting for Social Norms* in COMPARATIVE LAW AND SOCIETY 92–104 (David S. Clark ed., Edward Elgar 2012); Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUBLIC CHOICE 419–33 (2003). *See also* FRANSCECO PARISI & VINCY FON, THE ECONOMICS OF LAW MAKING (Oxford Univ. Press 2009).

51. *See*, among others, MARTIN HOLLIS, REASON IN ACTION (Cambridge Univ. Press 1996). For a broad introduction on the "will-reason" dichotomy, *see* KAARLO TUORI, RATIO AND VOLUNTAS: THE TENSION BETWEEN REASON AND WILL IN LAW (Ashgate, 2010).

The fact that John Finnis uses the antithesis between "commensurability" and "incommensurability" (which are two technical terms used in mathematics and physics—that is, two sciences in which the individual makes no appearance) to make a claim for the possibility of rational choice is the maximum expression of the fallacy that affects the notion that reason can *act*. *See Practical Reasoning in Law: Some Clarifications*, now in JOHN FINNIS, PHILOSOPHY OF LAW 353–73, at 358 (Oxford Univ. Press 2011); *See also supra* note 14. The same fallacy affects Habermas, according to whom "[t]he law presents itself as a system of rights only as long as we consider it in terms of its specific function of stabilizing *behavioural* expectation." HABERMAS, *supra* note 3, at 133. Emphasis added.

52. HABERMAS, LOGIC OF SOCIAL SCIENCES, *supra* note 14, at 46. *See also infra* note 154.

simply because rationality informs our *behaviour*, not our *actions*. We do not decide when we *behave* because our will, and thus the conflict between *velle* and *nolle*, does not appear in *behavioural* procedures. This conflict only arises when we are free to both make a decision and *act* accordingly. The fact that the decision is (and cannot be anything but) the outcome of such a conflict makes it clear that only the power-to-will, that is the power to (per-)form our uniqueness by making choices, is self-defining. This is why will's autonomy can transcend the power of reason. Heidegger's discussion of Scheler's account against the "objectification of acts" and Greek and Christian components of traditional anthropology, along with his explanation of *Dasein*'s resoluteness, is what we should look at to fully understand this phenomenon. It will then become evident that, despite what is commonly argued, to say that Oedipus is not evil because he makes "rational choices" would be misleading. On the contrary—in opposition to the Old Testament's Cain, who decides according to his power-to-will and then *acts*, Oedipus is not evil because he does not choose at all but merely *behaves*.

The *constitutive* force of human uniqueness lies within the anthro-sociopolitical essence of the self's power of affirmation or negation through willing *action*. The homogenisation of sociopolitical practices through the neutralisation of local sensibilities and ways of expression brought about by the Westernisation of *behavioural* standards is aimed at dissolving the internal conflict that generates this *unique* force. Avowedly, the connections among our power of affirmation or negation, human plurality, and *action* was clear to Arendt. While explaining why "distinctness" and "otherness" should not be considered the same thing and why in humans they get fused together to become "uniqueness", Arendt remarkably claimed that "[i]f men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would neither need speech nor action to

make themselves understood."[53] This then led her to claim that "human plurality is the paradoxical plurality of unique beings."[54]

Not surprisingly, the shift from "input" to "output" forms of (non-)legitimation and (non-)accountability in which the experimentalist architecture of inter-connected channels of PNG is rooted is one of the main components of the current dissolution of what makes us human.[55] If to *act*, as the etymological essence of the Greek word *archein* reveals, is "to set something into motion," from the anthropological point of view, this *constitutive* beginning, as Arendt has persuasively claimed,[56] is the beginning of "somebody" in his/her "uniqueness". Hence, if *action* is the manifestation of the sovereign decision that creates, as God did, something *ex nihilo*—from nothingness—as Schmitt (and Bergson) correctly understood,[57] and in so doing determines who we are, it is quite evident that in the uniformed and dehumanised post-

53. ARENDT, HUMAN CONDITION, *supra* note 25, at 175–76. *See also id.* at 41.

54. *Id.* at 176.

55. *See supra* note 8. I do not agree with Sabel and Zeitlin's suggestion that experimentalist forms of (European) PNG are the product of human *action* and therefore arose from Adam Ferguson's third class of social phenomena. EXPERIMENTALIST GOVERNANCE IN THE EU, *supra* note 8, at 9.

56. ARENDT, *supra* note 25, at 177. *See also* HANNAH ARENDT, BETWEEN PAST AND FUTURE 155–63 (Penguin Books 2006) (1961). Arendt quotes twice, in both THE HUMAN CONDITION and THE LIFE OF THE MIND, Augustine's insight that *"*[*i*]*nitium ut esset homo creatus est*," *id.* and *supra* note 16, at 158. *See also* Michael A. Wilkinson, *Between Freedom and Law*; Emilios Christodoulidis & Andrew Schaap, *Arendt's Constitutional Question*; and Jan Klabbers, *Hannah Arendt and the Languages of Global Governance* in HANNAH ARENDT AND THE LAW 35–61, 101–14, 229–47 (Marco Goldoni & Christopher McCorkindale eds., Hart Publ'g 2013).

57. In Schmitt's words, the "constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively, the decision emanates from nothingness." *See* SCHMITT, *supra* note 41, at 31–2. In CONSTITUTIONAL THEORY, Schmitt further maintains that "[a] constitution is not based on a norm [but] on a political decision concerning the type and form of its own being, which stems from its political being." *See* CARL SCHMITT, CONSTITUTIONAL THEORY 125 (Jeffrey Seitzer trans., Duke Univ. Press 2008) (1928). *See also* Hannah Arendt, *Lying in Politics* in HANNAH ARENDT, CRISES OF THE REPUBLIC 5 (Harcourt 1972) [hereinafter CRISES OF THE REPUBLIC], when it is claimed that "[i]n order to make room for one's own action, something that was there before must be removed or destroyed, and things as they were before are changed." *See also infra* note 74 and note 161.

political framework of "civilised economy" in which the spatiality of local identities, sensibilities, and cultures is dissolved and the *constitutive* force of man's uniqueness is nullified, there is no need for "input" forms of sociopolitical regulation. Being the post-national "constellation" the (non-)dimension in which the sovereign, *active* will as the source of political (self-)creation is neutralised, revolutions and constitutional process of "input" political legitimation are no longer needed in it. In other words, (universalised) liberalism displaces the irreducibility of foundation.

As a result, the authority of the jurist to give a normative meaning to our choices and to hold us accountable for what we decide to do or not to do plays no role in a uniformed (non-)dimension, such as that of the liberal global order, in which social rules are distortedly confused with legal norms,[58] and in which its participants never *actively* decide "for" or "against" something or someone because they all *behave* according to reason- or interest-oriented schemes of interaction. This is why the sterile structures through which the post-national framework is administered neutralise the anthropological and onto-sociopolitical

58. I agree with Alan Watson that "[t]he core of law is authority," in *Legal Culture v. Legal Tradition*, EPISTEMOLOGY AND METHODOLOGY, *supra* note 46, 1–6, at 2. In this sense, amongst all possible differences, what matters here is that, whilst conducting a theological inquiry into how the concept of "will" evolved alongside the *operative* understanding of the concept of "being" in terms of form-of-life, Agamben has demonstrated that the norm does not necessarily need two or more parties perform its claims. *See* GIORGIO AGAMBEN, THE HIGHEST POVERTY (Adam Kotso trans., Stanford Univ. Press 2013) [hereinafter HIGHEST POVERTY]; AGAMBEN, OPUS DEI (Adam Kotso trans., Stanford Univ. Press 2013) [hereinafter OPUS DEI]. *See also* AGAMBEN, THE COMING COMMUNITY, *supra* note 6, at 3–12. Blankenburg has correctly noted that the incredible confusion between the legal norm and social rules has led to believe in the exact opposite myth, namely that "legal rules are rooted in social norms." *See Civil Litigation Rates as Indicators for Legal Cultures* in COMPARING LEGAL CULTURES, *supra* note 11, 41–68, at 64. *See also* SOCIAL AND LEGAL NORMS (Matthias Baier ed., Ashgate 2013). *See also supra* note 47. Gordon Woodaman denies that law is a specific field of social reality: *see* Gordon Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM 21 (1998). *Contra*, *see* M. Croce, *Is Law a Special Domain? On the Boundary Between the Legal and the Social* in CONCEPTS OF LAW, *supra* note 3, 153–68.

function of *jus-dicere*: the jurist, the (rule of) law,[59] legal interpretation, and analysis broadly understood, are no longer needed in a soft-networked system of rational and mechanical causations characterised by the never-ending apolitical performance of collective platforms of "regulatory" peer-review dialogue that lack any form of supervision (and in particular that offered by the "principal-agent" model).[60]

That said, a question comes to mind: if the activity of the jurist only makes sense in a sociopolitical scenario in which the individual's sovereign will manifests itself by *actively* making choices, why (and how) did liberalism and its globalisation displace willpower in favour of reason? The answer is that liberalism needed to carry out this shift in order to make its strategy succeed. Once the inner power of affirmation or negation of the self, which, according to Augustine, constitutes the freedom of the will, is completely annihilated, the empty space left by this revolutionary operation can be easily filled by *behavioural* schemes of rational, social interaction. This is not surprising. Augustine is, as Arendt has correctly noted,[61] "the first philosopher" of the will. His task was to uncover the cause of evil through the transformation of Paul's "two laws" (the Old Law which says "thou shalt do" and the New Law which says "thou shalt will"[62]) into the two wills (I-*will* and I-*nill*) which lies at the

59. For an introduction to the dichotomy of "post-national governance-rule of law," *see* KRISCH, *supra* note 8, at 276–96. For a brilliant account of the "social deficit" in the rule of law, *see* Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUDIES 1 (1999).

60. My claim that soft-networked channels of PNG are rooted in liberalism's infinite rationalistic openness cannot be understood, and eventually criticised, without bearing in mind that "[t]he centrality of reason means that liberal practice and liberal theory are *continuous* activities." KAHN, *supra* note 8, at 14. Emphasis added.

61. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 84–110.

62. *Id.* at 84. As we shall see below, Paul's revolutionary introduction of the spiritual willing ego was meant to provide humankind with the freedom to choose whether or not to fulfill the Messianic message while neutralising the social divisions and conditions imposed under Hebrew and Roman law (*cf.*, for instance, Romans 3:11, 3:19-20, 7:7, 8:11, and 10:4; Corinthians 7:20-23 and 29-32), and in so doing, defeat man's finitude and death (*cf.* Acts 24:21). To

bottom of men's internal conflict from which the choice between *velle* and *nolle* arises.[63] With the aim to eliminate the individual's *volo me velle* and unpredictability of its presentifications (which is precisely what our uniqueness is rooted in), liberalism has displaced what determines what is good and bad and then *acts* accordingly. This is why, as Kahn has persuasively claimed, "[l]iberalism fails to understand evil for just the same reason that it fails to understand love."[64] This is so because liberalism's "horizon of explanation is framed by reason, on the one hand, and personal well-being, on the other. Between reason and interest, it can find no third term."[65] As a result, liberalism has simultaneously neutralised the performative instances of the self's political unconscious[66] and critical attitude toward the legitimacy of legal rules (or what Duns Scotus would call *experentia interna*). No

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understand why Paul's universalism is different from what is currently taking place, *see* GIORGIO AGAMBEN, THE TIME THAT REMAINS 44–58 and 88–112 (Patricia Delay trans., Stanford Univ. Press 2005) [hereinafter TIME THAT REMAINS]; Agamben, *The Messiah and the Sovereign: The Problem of Law in Walter Benjamin* in POTENTIALITIES 160–74 (Daniel Heller-Roazen trans. & ed., Stanford Univ. Press 1999).

63. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 89.

64. KAHN, OUT OF EDEN, *supra* note 40, at 53. In providing a theological critique of liberalism's "narrative of political progress" through an inquiry into the "problem of evil," Kahn compellingly suggests that the liberal doctrine may be linked to the return to "Genesis one", that is, to the condition of pure (and sterile, I would add) contemplation in which man and woman found themselves before the Fall (from which begins "Genesis two"). Only by exercising their willpower, and thus choosing to *act for* the benefit of their own knowledge (and in particular the knowledge of their finitude and death) and *against* the rational law imposed from above, Adam and Eve broke with the Greek tradition and became "human." This means that, from a theological point of view, will (and our *active* use of it) is what makes us human. If we unite this perspective to what was mentioned in note 62, it becomes clear why, according to Kahn, "Rawls' idea of reaching a knowledge of justice behind the veil of ignorance is the symbolism of leaving this fallen world of particular concerns and returning to a purer space of undifferentiated, equal individuals." *Id.* at 98. For an introduction on how the myth(s) of Genesis informed Western culture in terms of freedom-to-will, *see* PAGELS, *supra* note 16; EVE AND ADAM (Kristen E. Kvam, Linda S. Schearin & Valarie H. Ziegler eds., Indiana Univ. Press 1999); GARY A. ANDERSON, THE GENESIS OF PERFECTION (Westminster John Knox Press 2001).

65. KAHN, OUT OF EDEN. *supra* note 40, at 98.

66. *See,* in particular, FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS (Routledge 2002) (1981).

wonder, then, why the term "post-national" was taken up by Habermas,[67] and why pluralist forms of PNG transcend state-based patterns of legislation and political regulation or administration.

It seems to me to follow from these considerations that what liberalism and its globalisation have thus targeted is humans' political essence as expressed on the one hand by the will's power of assertion and denial, and on the other hand by the fact that no one can act alone. The promoters of the uniformed *Oikoumene*, as a (non-)dimension in which cultures and identities are innocent and indifferent because they have been annihilated by the levelling and conformist demands of the global (open) society, are fully aware that the "fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable [and that this] is possible only because each man is unique . . . ."[68] The shift from those who willingly and politically *act* to "Human" who rationally and interestingly *behaves* should be seen as a component of the broader strategy to neutralise the boundlessness of *action* and the unpredictability of the outcomes which have always characterised human conduct. In this sense, if the public realm, as distinguished from the private sphere, is the space of human appearance, and if political power "is what keeps the public realm . . . between action and speaking men, in existence,"[69] it is anything but surprising that the global-order project, with its soft-networked and post-national web of social connectivity, is aimed at the nullification of modern stated-based schemes of political and legal order.

In this sense, if we bear in mind that Ancient Greece believed that the aforementioned idea of creation out of nothing was simply

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67. JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION (MIT Press 2002) (1998).

68. ARENDT, HUMAN CONDITION, *supra* note 25, at 178.

69. *Id.* at 200. Arendt further clarifies that this type of power "preserves the public realm and the space of appearance, and as such it is also the lifeblood of the human artifice, which, unless it is the scene of action and speech, of the web of human affairs and relationships and the stores engendered by them, lacks its ultimate *raison d'être*." *Id.* at 204.

unconceivable,[70] it becomes clear why liberalism and the intangible (non-)dimension and illimitable potentialities prompted by its universalization recall Aristotle's *behavioural* "I-*can*",[71] rather than Schmitt's *active* "I-*will*".[72] Notably, Aristotle, whose definition of man as the living being who has *λόγος* has become canonical in Western belief in man as animal *rationale*, challenged the Platonic view that reason is incapable of "moving" things. This was done through the promotion, in Agamben's words, of "a theory of potential and habit [that] is in truth a way for Aristotle to introduce movement into being."[73] *Kinēsis* is indeed the fundamental concept in Aristotelian metaphysics, while, not surprisingly, *stasis*, as a state of exception in which the sovereign suspends the validity of the norm with the aim of saving the legal order unconventionally from its own death with a pure political act (*necessitas non habet legem*), is that of Schmitt.[74] Hence, it makes

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70. Pythagoras, Plato, Aristotle, and, more importantly, Zeno all believed that nothing is absolutely new.

71. Audi has defined this faculty as the actor's performative reasoning that originates and evolves according to innumerable explicative propositions that work as "object language formulations" of "the rules constitutive of the game in which 'want' functions." *See* ROBERT AUDI, ACTION, INTENTION AND REASON 36–37 (Cornell Univ. Press 1993). On why Aristotle's notion of deliberative choice, as a *tertium comparationis* between reason and desire, cannot be defined as "will," *see* ARENDT, 2 LIFE OF THE MIND, *supra* note 16, 55–63. *See also* GIORGIO AGAMBEN, THE MAN WITHOUT CONTENT 59–93 (Georgia Albert trans., Stanford Univ. Press 1999) (1994) [hereinafter MAN WITHOUT CONTENT].

72. Agamben, who in trying to define a faculty claims that every time "something is or is not 'in one's power' . . . we are already in the domain of potentiality," would probably not agree with this distinction. *See* AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 178. On Schmitt's decisionism, *see* Siliquini-Cinelli, *Imago Veritas Falsa*, *supra* note 7.

73. AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 95. Yet if we unite this claim with what Agamben himself argues while further inquiring into Aristotle's concept of potentiality, which says that what is essential therein is the "existence of non-Being," it becomes clear that what the Aristotelian "I-*can*" leads to is nothing but a zone of indistinction between "to be" and "not to be." *See* ON POTENTIALITY, *supra* note 62, 177–84, at 179. *See also* AGAMBEN, HOMO SACER 46 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1993) [hereinafter HOMO SACER]; AGAMBEN, THE COMING COMMUNITY, *supra* note 6, at 35–7.

74. The "divine conflict" between God and the crucified Jesus as described in Moltmann's *The Crucified God* may be considered the first Schmittian state

perfect sense that, as Arendt carefully explains, Plato believed that "human affairs . . . the outcome of *action* . . . should not be treated with great seriousness."[75] In this sense, both Plato and Aristotle, who "did not count legislating among the political activities,"[76] may be seen as the forerunners of (liberal and economic) interest theory.

While marking a totally new reappraisal of the matter through the implementation of the pre-Christian view and negation of willpower, Spinoza developed further what was claimed by Greek philosophy. Spinozism may be viewed as the pre-modern forerunner of the current essence of the globalising trend against the *constitutive* force of the willing ego and the anthropological and sociopolitical need for an authority that *posits* the law.[77] This seems to be further confirmed by the use of Spinoza in Deleuze's contemplative empiricism, which, as is well-known, is characterised by the total disappearance of the subject and any idea

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of exception in political theology from which Christianity, and hence the West as we know it today, originated; *see* JÜRGEN MOLTMANN, THE CRUCIFIED GOD: THE CROSS OF CHRIST AS THE FOUNDATION AND CRITICISM OF CHRISTIAN THEOLOGY 146, 154–55, and 162–63 (SCM Press 2002) (1973). *See also supra* note 57. For present purposes it is extremely relevant to note that, while introducing the faculty of will, Paul's aforementioned revolution paradoxically caused what Agamben has persuasively defined as the "messianic inversion of the potential-act relation." Paul was perfectly aware of the Greek opposition between *act* and *potentiality* and effected this inversion by restoring the law's "dividing" principle to a state of pure potentiality in which the "non-normative figure of the law" could emerge as "*nomos* no-longer-at-work." In overcoming the flaws of Löwith and Blumemberg's notion of messianic time, Agamben correctly clarifies that the effect of the Pauline *katargēsis* (the exceptional condition law's inoperativeness which Paul calls *nomos pisteōs*) should not be confused with the *eschaton*, but should rather be compared with Schmitt's state of exception. *See* AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 63, and 88–112. *See also* AGAMBEN, HOMO SACER, *supra* note 73; AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chicago Press 2003, 2005).

75. ARENDT, HUMAN CONDITION, *supra* note 25, at 185. Emphasis added. *See also id.* at 195.

76. *Id.* at 194.

77. After having heard Friedrich Heinrich Jacobi reading Goethe's *Prometheus*, Lessing shouted the totalising "*Hen kai pan!*" and proudly claimed to have turned into a Spinozist. *See* JAN ASSMANN, MOSES THE EGYPTIAN 139–43 (Harvard Univ. Press 1998); ASSMAN, RELIGIO DUPLEX 2–3 (Polity Press 2014).

of self-consciousness.[78] Yet the turn to the universal capacity of reason officially began, as Arendt and Kahn have pointed out, with Kant. It is true that it was Duns Scotus who, in arguing for the primacy of the will over that of the intellect, first distinguished between the "natural" will, which, in Arendt's words, "follows natural inclinations, and may be inspired by reason as well as desire,"[79] and "free" autonomous will which, as the Will through which God created the world *ex nihilo*, performs in total freedom from external causations.

Kant utopistically dreamed of a perpetual (that is, totalising) peace in which "[t]he subject is now to give to himself the principle of his own being: reason."[80] The (liberal) function of the "categorical imperative" (you must "act according to that maxim whose universality as law you can at the same time will"[81]) is therefore very clear: it is aimed at neutralising the performative conflict that takes place within the will between *velle* and *nolle* and whose essence has kept theologians and philosophers busy since Paul's Messianic revolution. Indeed, according to Kant, "will is absolutely good [when] it is a will whose maxim, when made universal law, can never conflict with itself."[82] This belief is not only one of the main components of current economic theory and the information it provides,[83] but eventually led to all neo-Kantian

78. Life, according to Deleuze, "is pure contemplation without knowledge." *See* GILLES DELEUZE & FÉLIX GUATTARI, WHAT IS PHILOSOPHY? 213 (Hugh Tomlinson & Graham Burchell trans., Columbia Univ. Press 1994) (1991). *See also id.* at 43. Not surprisingly, this *inactive* idea of life brings us back to both the aforementioned pre-Adam-and-Eve condition of "Genesis one" and the notion of "potentiality" in Aristotelian metaphysics. On the similarities between Deleuze and Aristotle, *see* Giorgio Agamben, *Absolute Immanence* in POTENTIALITIES, *supra* note 62, at 220–239.

79. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 132.

80. KAHN, OUT OF EDEN, *supra* note 40, at 59; *see also* KENNEDY, *supra* note 30, at 58.

81. KANT, *supra* note 13, at 54.

82. *Id.*

83. Which, in Habermas's words, "cannot be 'true' or 'false' [but has rather] the status of conditional *imperatives* which may be deductively 'valid' or 'invalid.'" *See* HABERMAS, LOGIC OF SOCIAL SCIENCES, *supra* note 14, at 52. Emphasis added.

forms of social analysis, such as that of von Kempski, according to whom all social sciences, including jurisprudence, can be explained through the dehumanized *behavioural* schemes offered by mathematical economics.

If only in such an imperial system of uniformed *behaviour*, basic equal rights and individual liberty (such as property and contract rights) could be guaranteed, then it should not surprise anyone that Kantian aesthetics is about the rise of a particular type of "genius" who is paradoxically capable of creating his/her own works "unconsciously."[84] Schmitt spotted this while arguing (not without inconsistencies[85]) against the emergence of aesthetics as a sign of the rationalisation of politics. Similarly, but with a different aim, Arendt understood full well the essence of Kant's *fictio* when claiming that "[t]he Will in Kant is in fact 'practical reason' much in the sense of Aristotle's *nous praktikos*; it borrows its obligatory power from the compulsion entered on the mind by self-evident truth or logical reasoning."[86] Yet it is precisely the willing ego's essential conflict between its own affirmation and negation that constitutes the "spark" of the *active* unique existence of humans in anthropological and sociopolitical terms.

III. AGAINST INTERPRETATION?

Susan Sontag's and Josef Esser's accounts could not be more opposed to each other. While the former tries to explain why the

84. Gadamer, who along with Paul Ricoeur was the leading post-Heideggerian hermeneutical philosopher, rightly claimed that "Kant makes the concept of genius serve his transcendental inquiry completely and does not slip into empirical psychology" in the sense that his "transcendental reflection . . . does not permit a philosophical aesthetics." *See* HANS-GEORG GADAMER, TRUTH AND METHOD 49, 51 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury 2004) (1975) [hereinafter TRUTH AND METHOD].

85. One of the most compelling critiques of Schmitt's battle against the aesthetics of liberalism and its shift from *action* to *acting* can be found in Victoria Kahn, *Hamlet or Hecuba: Carl Schmitt's Decision*, 83 REPRESENTATIONS 67–96 (2003).

86. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 63. For a recent rehabilitation of Arendt's "political action," *see* Lucy Cane *Hannah Arendt on the Principles of Political Action*, 14 EUR. J. POLITICAL THEORY 55 (2015).

interpretative task is a misleading *fictio* through which the interpreter replaces the original author (or artist, as Sontag writes), the latter aims to demonstrate that it is only through a particular type of (normative) interpretation that the "true" meaning of the (legal) text may appear and perform. Both claims should be investigated carefully.

A. The Arrogance of Interpretation

To try to interpret Sontag's essay "Against Interpretation", her most famous work, first published in its entirety in 1966, is, *per se*, already a mistake, considering that she specifically asks us to abandon any interpretative desire when approaching the text. How can we even try to interpret something that stands against any interpretative attempt? If we follow Sontag's indications strictly, we should not even read what she wrote. Yet the mythical essence and concrete existence of the *act* of interpretation have kept humanists busy since the thinking faculty was discovered. This is so because, as Arendt noted,[87] what makes us think is what Kant defined as "reason's need." To delve into this need seems, however, impossible. Philosophers have tried to get a better understanding of it since Anaxagoras, who around 440 B.C. claimed that the mind has power over all things that have life and is the source of all motion. Hence the explosive energy of Sontag's essay is that, in just under fifteen printed pages, it renders centuries of anthropological, philosophical, metaphysical, ontological, artistic, and legal inquiry absolutely obsolete and ridiculous. In this sense, what is truly impressive is that Sontag was not an anthropologist, a philosopher, or a lawyer, but a Jewish-American intellectual and writer who had a long academic apprenticeship at Berkley, Chicago, and Harvard. Her fight against modern nihilism

87. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 69. *But see* the whole first volume as well.

must therefore be understood as a fight from the outside, not from within.

Sontag develops a powerful statement against what she describes as "a conscious act of the mind which illustrates a certain code, certain 'rules' of interpretation."[88] From this perspective, "interpretation means plucking a set of elements . . . from the whole work."[89] This is why, in her view, every interpretation requires a translation.[90] The question is, then, what is to be translated, and into what do we translate it? This is a key question if we are to understand the operability of the (non-)subject, that is the dissolution of the author into the interpreter which occurs between original presentation and re-presentation. In trying to provide an answer, Sontag first claims that the "modern style" of interpretation is structurally different from that of late classical antiquity. Indeed, while, for instance, the Stoic desire for interpretation was evinced "to reconcile the ancient texts to 'modern' demands," the interpretative task of our own time does nothing but "destroys."[91] That is to say, the modern style of interpretation brings the "discrepancy between the clear meaning of the text and the demands of (later) readers"[92] to levels which were unknown at the time of Philo of Alexandria and which annihilate the *constitutive* force that led to the creation of what is interpreted. In a sort of Derridean disruptive motion, the "modern style of interpretation excavates, and as it excavates, destroys; it 'digs' behind the text, to find a sub-text which is the true one."[93]

From the perspective of legal theory, Sontag's claim sounds like a defence of positivism and its belief that the presence of what

88. SONTAG, *supra* note 45, at 5.
89. *Id.*
90. *Id*. On this, *see also* GADAMER, TRUTH AND METHOD, *supra* note 84, at 401–23.
91. SONTAG, *supra* note 45, at 6.
92. *Id*.
93. *Id*.

is non-legal is not necessary to make law properly legal.[94] What matters, then, is that, in doing so, the interpreter replaces the original author by pushing aside what Sontag labels the "manifest" content for the sake of the "latent" one which, through a clever move, is given "true" meaning. Hence, according to Sontag, interpretation can never claim to be innocent and pure: it always implies a contingent *fictio,* which must be evaluated "within a historical view of human consciousness."[95]

From this perspective, interpretation is nothing but a manipulative process of new production of content that aims to overcome the limits of what one might call "historical distance." Indeed, Gadamer argued in 1964 that "[o]ur experience and interpretation is obviously in no sense limited by the *mens auctoris*."[96] Even more importantly, eleven years later he maintained that "every translator is an interpreter," and that despite what happens between two people in conversation, any text "speaks only through the other partner, the interpreter."[97] This is so because "the interpreting word [is] the word of the interpreter [because] assimilation is no mere reproduction or repetition of the

94. Hegel believed that there is in language always a superior, concealed "un-said" or "never said" as the ultimate true meaning that may be explained only in terms of language's universality and that has to be ultimately linked to the temporal process of self-negation. He would thus not agree with this view. As Agamben noted while inquiring into the mystery and strength of the Hegelian "unspeakable", "[t]hat which is thus unspeakable, for language, is none other than the very meaning, the *Meinung*, which, as such, remains necessarily unsaid in every saying." *See* GIORGIO AGAMBEN, LANGUAGE AND DEATH 13 (Karen E. Pinkus & Michael Hardt trans., Minn. Univ. of Minn. Press 1991) (1982) [hereinafter LANGUAGE AND DEATH]; AGAMBEN, INFANCY AND HISTORY (Liz Heron trans., Verso 2007) (1978). *See also* AGAMBEN, HOMO SACER, *supra* note 73, at 21; AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 27–87. *See also infra* note 155. I have discussed both (legal) positivism's and pragmatism's political sin in Siliquini-Cinelli, *Imago Veritas Falsa*, *supra* note 7.

95. SONTAG, *supra* note 45, at 7.

96. Hans-Georg Gadamer, *Martin Heidegger and Marburg Theology* in PHILOSOPHICAL HERMENEUTICS 198–211, at 209 (David E. Linge trans. & ed.; Univ. of Cal. Press 2008) (1976) [hereinafter PHILOSOPHICAL HERMENEUTICS].

97. GADAMER, TRUTH AND METHOD, *supra* note 84, at 405. *See also id.* at 303, 307, and *infra* note 161.

traditionary text; it is a new creation of understanding."[98] It seems, then, that Sontag brought to its logical conclusion Gadamer's claim ten years before it was made, because, in her view, from being the object, the content becomes, through the interpreter, the new subject. When we embark on the interpretative task, we replace the subject who created the object on which we are focussing our efforts with the object itself, and to this object we then attribute the specific meaning that we want: interpretation is therefore the way through which we replace the original creator with ourselves (subject X → object → subject Y). This can also be expressed by saying that, in pursuing such a roadmap, which in legal theory could not be more opposed to historical and systematic forms of interpretation, the self-consciousness of the artist who created what is interpreted is nullified and displaced from view. Any interpretation displaces the sovereign will of the artist, or original creator.

So the question arises: What should we do to stop this process of dissolution? According to Sontag, whose only hope is that "interpretation [will] not . . . always prevail,"[99] we should all pay more attention to the form rather than to the content of the object of our interest.[100] This is not surprising. Given that "excessive stress on the content provokes the arrogance of interpretation,"[101] the only activity by which the spectator (or interpreter) may respect the presentification of the author's self-consciousness is silent investigation strictly into the form of what s/he created. This means that, according to Sontag, we need to displace the content from our view if we, as spectators, really want to find it.[102] Yet it

98. GADAMER, TRUTH AND METHOD, *supra* note 84, at 489.
99. SONTAG, *supra* note 45, 10.
100. *Id.* at 12–13.
101. *Id.* at 12.
102. Even though he does not quote Sontag, Agamben turns her strategy upside down and argues that it is instead the artist who should stop hoping to find his/her certainty in the content of what s/he created. More precisely, in inquiring into why "art leaves behind the neutral horizon of the aesthetic and recognises itself in the 'golden ball' of the *will to power*," Agamben argues that

seems to me that this also means that we must turn into some sort of Aristotelian non-interpreters;[103] in pleading for a shift from the analysis of the content to that of the form of what is interpreted, Sontag is in truth asking us to deal only with a superficial and secondary component of the author's self-consciousness. Form without content can never lead us to the discovery of the self. This can only happen when the form actually becomes the content. And as Agamben has persuasively argued while inquiring into the theological moralisation of Western habits,[104] this only happened through the monastic development of the *evangelicus canon* as a "form-of-living" (or *forma vivendi*)—in other words, when the monastic rules of the patristic texts of the early centuries prescribed a form-of-life that was the combination of a totalising way of *being* and *acting*. Hence, even if we agree with Sontag when she claims that "interpretation takes the sensory experience of the work of art for granted,"[105] and that this is the reason why we should opt for a methodology of inquiry that preserves transparency as "the highest, most liberating value in art,"[106] we cannot agree with her radical strategy on how to reach the

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while the spectator "confronts absolute otherness in the work of art," the artist experiences "artistic subjectivity"—that is, a zone of indistinction between "absolute essence" and "absolute abstract inessence." In particular, this abstract inessence is, in truth, the "pure creative-formal principle" which, "split from any content," "annihilates and dissolves every content in its continuous effort to transcend and actualize itself." This process, Agamben maintains, puts the artist "in the paradoxical condition of having to find his own essence precisely in the inessential, his content in what is mere form." *See* AGAMBEN, MAN WITHOUT CONTENT, *supra* note 71, at 2 and 54. Emphasis added. *See also infra* note 159.

103. Agamben has demonstrated, I think successfully, that in *De Interpretatione,* "the letter, as interpreter of the voice, does not itself need any other interpreter. It is the final interpreter . . . the limit of all interpretation." *See The Thing Itself* in AGAMBEN, TIME THAT REMAINS, *supra* note 62, 27–38, at 37.

104. AGAMBEN, THE HIGHEST POVERTY *and* OPUS DEI, *supra* note 58, and AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 27.

105. SONTAG, *supra* note 45, at 13.

106. *Id*.

"luminousness of the thing in itself, of things being what they are."[107]

Sontag's passionate account cannot be understood completely without addressing another compelling essay of hers, "The Anthropologist as Hero,"[108] which unfortunately has not received the same attention as "Against Interpretation." Through an (interpretative?) analysis of Claude Lévi-Strauss's formalism and intellectual agnosticism, this second essay was written with the aim of demonstrating how "[t]he unreliability of human experience brought about by the inhuman acceleration of historical chance has led every sensitive modern mind to the recording of some kind of nausea, of intellectual vertigo."[109] The result of this trauma is terrible: "[t]he other is experienced as a harsh purification of the self."[110] Put bluntly, this means that in trying to bring together the self-consciousness of the interpreter and the original creator, we actually dissolve both. This is so because, in Sontag's words, "[m]odern sensibility moves between two seemingly contradictory but actually related impulses: surrender to the exotic, the strange, the other; and the domestication of the exotic, chiefly through science."[111] In this sense, the most powerful statement made by Sontag in "Against Interpretation" is probably the last one, in which she claims that "[i]n place of a hermeneutics, we need an erotics of art,"[112] that is, an erotic of pure passion that acts as a spark of life. There may be no doubt that, as we shall see, Esser fully internalized the difference between interpretation and hermeneutic, and that such difference was clarified by Gadamer at the very beginning of his *magnum opus.*[113] It seems, however, that Sontag was not sufficiently aware of it.

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107. *Id*.
108. *Id*. at 69–81.
109. *Id*. at 69.
110. *Id*.
111. *Id*. at 70.
112. *Id*. at 14.
113. GADAMER, TRUTH AND METHOD, *supra* note 84, at xxvii–xxxv, 306, and 403. Hermeneutics, with its comprehensive perspective, is not a "method",

B. The Value of Interpretation

I have introduced the significance of Esser's account of the interpretative task elsewhere.[114] On that occasion, I claimed that Esser has demonstrated that our comprehension, individualisation, and further conviction of what the idea of law is, passes through the *decisive* combination of the *interpretation* and *judgment of value* of the positivistic content of the norm. I now wish to further clarify what I meant, and contextualise it in light of this paper's claims.

Esser believes that *the* law is always the combination of two types of *jus*: *scriptum* and *non scriptum*. As the (tangible) nature of the former is well-known, Esser delves into the essence of the latter to demonstrate that legal interpretation always *acts* as an unwritten source of law. More than thirty years later, Supiot similarly argued that the interpretation of the law is "not enclosed within the letter of its texts but open to the spirit that informs it."[115] The energy that emanates from this notion of legal interpretation requires us to investigate cautiously how this special unwritten source influences the activity of *jus-dicere*—that is to say, how legal interpretation leads us first to find the norm that fits our needs

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but the study of the universalist linguistic process of signification. From an ontological point of view, hermeneutics has therefore more in common with semiotics, which can be defined as the science of signs, than with interpretation. Yet hermeneutics and interpretation overlap significantly, as when Gadamer claims that "[t]he genuine reality of the hermeneutical process seems . . . to encompass the self-understanding of the interpreter as well as what is interpreted." *See* GADAMER, *On the Problem of Self-Understanding* in PHILOSOPHICAL HERMENEUTICS, *supra* note 96, 44–58, at 58. *See also* BERNARD JACKSON, SEMIOTICS AND LEGAL THEORY (Deborah Charles Pubs 1997) (1985); JACKSON, LAW, FACT AND NARRATIVE COHERENCE (Deborah Charles Pubs 1988); COSTAS DOUZINAS, RONNIE WARRINGTON & SHAUN MCVEIGH, POSTMODERN JURISPRUDENCE 92–110 (Routledge 1993); Maksymilian Del Mar, *System Values and Understanding Legal Language*, 21 LEIDEN J. INT'L L. 29 (2008).

114. Siliquini-Cinelli, *Imago Veritas Falsa*, *supra* note 7.

115. SUPIOT, *supra* note 9, at 115.

and then makes that norm capable of performing its regulative instances through an *act*-ualising decision.

Esser accepts the challenge, and, as the central point of his inquiry into the pre-comprehension of the method(s) of juridical comprehension,[116] describes several types of legal interpretation (i.e., dogmatic, grammatical, systemic, historical, normative) with the clear intent of uncovering the real essence of what is usually defined as the *ratio juris*, the juridical *reasoning* that lies behind the norm and that, if correctly interpreted, makes it suitable for application. In this regard, Esser believes that the fact that a legal disposition has a *ratio* means nothing more than that the interpreter, standing at a privileged point such as that of Friedrich's *Wander über dem Nebelmeer*, is required to deal with its possible sociopolitical applicative "horizons"[117] (or "expectations"[118]). In arguing so, Esser, who, unsurprisingly, quotes Habermas at the end of the chapter, overcomes both liberalism's and positivism's neutral automatism.

The starting point of Esser's analysis is indeed that no one would allow the creation and/or application of a norm seen as "unjust" by society. What the interpreter has the duty to achieve is, then, not "a" general comprehension of the norm, but the very best

116. The chapter on legal interpretation is, not accidently, the fifth in a series of nine, cutting the whole *opus* into two equal parts, four chapters preceding it and four following. *See* ESSER, *supra* note 45, at 112–37.

117. *Id.* at 136. The use of the term "horizon" is not accidental. Esser's research was profoundly influenced by that of Perelman, Heck, and, more importantly, Gadamer, to whom in particular understanding is always a (universal) process of mediation between the past horizon (composed of prejudices and tradition) of the text and the present one of the interpreter. *See* GADAMER, TRUTH AND METHOD, *supra* note 84, at 302–22, 334–50, and 455–506; GADAMER, *Man and Language* in PHILOSOPHICAL HERMENEUTICS, *supra* note 96, 59–68, at 67 [hereinafter *Man and Language*]. For present purposes it is quite relevant that Habermas, too, has inquired into Gadamer's use of the concept of the horizon to explain the hermeneutical task, in HABERMAS, LOGIC OF SOCIAL SCIENCES, *supra* note 14, 151–70.

118. ESSER, *supra* note 45, at 136. In describing Radbruch's view, Cotterrell explains why "[t]he jurist has to look beyond law's technical efficiency to its existence as an idea embodying cultural expectations," Cotterrell, *supra* note 23, at 21.

comprehension of it according to the essence of a (delicate and yet powerful) point of intersection between the *jus scriptum* of the norm and the horizons upon which the sociopolitical acceptance of its application inevitably depends. According to Esser, who is obviously well-aware of the structural laws that inform humans' capacity for understanding,[119] the comprehension of the legal text is therefore guided by an anticipation of the *sense* that informs the court's duty to judge. This is why, in his words, the pre-comprehension and choice of method to be followed in the process of "juridical individualisation" is "the premise of an understanding which may be used as a foundation for the [legal] decision."[120] This is how the interpreter is capable of checking the actual fairness of the norm. Yet this means that the reasoning of the interpreter, who deals with real people and real problems, must be equal to that of the historical (that is, no longer present) legislator because "the *ratio legis* can be 'better understood' by who applies the norm."[121] To formulate the issue in this way means that the interpreter undertakes a "critico-objective" revision of the norm targeted with the aim of ascertaining whether or not "that" norm can, and should, be used.

The last point warrants further comment. Esser makes it incredibly clear that (legal) interpretation would be deprived of its very sociopolitical meaning without the *a priori* recognition and the *a posteriori* protection of the interpreter's *active* power-to-will, upon which the "freedom to valuate"[122] the possible outcome(s) of the application of the norm ultimately depends. In this sense, the law-applying procedure, rooted in the decision-making one, becomes nothing more than the fulfilment of "the duty to regulate"[123] which is fulfilled through what Esser labels the

119. On this, *see* in particular Gadamer, *Man and Language*, *supra* note 117, at 59–68.
120. ESSER, *supra* note 45, at 135. My translation.
121. *Id.* at 114. My translation.
122. *Id.* at 115. My translation.
123. *Id.* at 117. My translation.

"interpretative praxis,"[124] that is, the original signification and further administration of its existential counterpart (*the* law). Such a duty, it is worth noting, makes the interpreter the canon of the "hermeneutical circle of the historical comprehension"[125] of the law: if law's performance depends upon what the interpreter understands of its given positivistic content—in other words, if the law is the combination of both the norm and the decision as previously mentioned—it is quite evident that the interpreter acts as *trait d'union* between the political will that drafted the norm and society at large. The interpreter is asked, therefore, to valuate the facts (freely) in order to encapsulate them efficiently within a normative framework, and then (freely) valuate and choose the interpretive method that will render the law able to keep its sociopolitical regulative promises. It is, then, the legal interpreter's double-faced *decisive* and *active* valuation that guides the law's performance. This is what Esser defines as the "normative purpose of interpretation,"[126] which, as he notes, is precisely what the Enlightenment's *raison d'État,* with its utopian belief in the "objectification of interpretative rules and dogmatisation of the [interpretative] method,"[127] has tried to neutralise.

Thus, if we want the jurist to understand why s/he is the protagonist in the process of "juridical *individual*-isation," we should free him/her from the influence of legal positivism's claims on the automatic self-applicability of the norm. No wonder, then, that Esser, who rejects the *fictio* prompted by historico-legal interpretation, opts for what could be defined as a *decisive* "contextualised-normative" interpretation, or a type of interpretation which "is necessarily guided by judgements of

124. *Id.* at 115. My translation.
125. *Id.* at 119. My translation.
126. *Id.* at 120. My translation.
127. *Id.* My translation. Esser's critique of the dogmatic method of interpretation is evidently rooted in that of Gadamer. *See* GADAMER, TRUTH AND METHOD, *supra* note 84, at 339–41.

value"[128] over all possible applicative expectations. Indeed, it is only through these performative judgments that the "actualisation"[129] of every sociopolitical and legal institution can keep happening. What is relevant here is that this *act*-ualising process cannot take place if we do not first recognise that the *decision* in which the judgment is rooted is not mechanistically "offered" by the norm itself: this is so because the norm cannot, per se, "anticipate all estimative parameters [that are] necessary for the application of the law."[130] On the contrary, such a decision can only arise as the result of the problematic (that is, essential) conflict that takes place within the sovereign power-to-will while evaluating and deciding both "for" and "against" the aforementioned horizons/expectations and concrete usability of the norm.[131] What matters for present purposes is thus that while Gadamer's philosophical hermeneutics was specifically aimed at overcoming the limits of Schleiermacher's and Dilthey's pure individualism by (partly) displacing subjectivity[132] from the process of understanding and conferring authoritative value to our prejudices,[133] Esser's theory of legal interpretation represents a zone of intersection between them.

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128. ESSER, *supra* note 45, at 127. My translation.

129. *Id.* at 128. My translation.

130. *Id*. My translation. *See also id.* at 135, where Esser argues that the jurist "comprehends the given text . . . in terms of a directing model which has a meaning according to his 'satisfying' *decision*". My translation. Emphasis added.

131. Which is why Esser maintains that "the path along the individualisation of the law through interpretation is never linear . . . but is a path of alternatives and hypotheses which . . . must be justified in the light of their possible plausibility." Any tentative attempt to achieve a mechanical (that is, positivistic, systemic, etc.) interpretation of the norm is therefore deemed to be unsuccessful. *Id.* at 131.

132. GADAMER, TRUTH AND METHOD, *supra* note 84, at 307–8, and 338; GADAMER, *Martin Heidegger*, *supra* note 96, at 58. *See*, *in comparison*, *infra* note 160. *See also* David E Linge's *Introduction* to GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 96, at xii–xxvii.

133. GADAMER, TRUTH AND METHOD, *supra* note 84, at 278–318. *See also* GADAMER, *The Universality of the Hermeneutical Problem* in PHILOSOPHICAL HERMENEUTICS, *supra* note 96, 3–17, at 12. *See also* George Duke, *Gadamer and Political Authority*, 13 EUR. J. LEGAL THEORY 25 (2014).

This is why Esser claims that the correspondence between the norm and the decision will inevitably lead us to delve into the "hermeneutical circle," which "consists in the relationship between formulations of problems and answers, to be intended as the comprehension of the norm" which itself is rooted in the "pre-judice over the necessity of discipline and possibility to solve [conflicts]."[134] If we turn the picture upside down and keep in mind what was mentioned about the distinction between social rules and legal norms, this means that the jurist cannot *norm*-alise our choices and offer *norm*-ative guidance to human conduct (or, as Paul would say, the jurist cannot act as a medium between the law and the rule, or *regula vitae*[135]), and the law cannot solve social conflicts, unless we first let the internal conflict between *velle* and *nolle* manifest itself within us. Thus, the *a priori essence* of the anthropological conflict that makes us human informs the *a posteriori* sociopolitical *existence* of the law, which conversely makes sense only in light of the former.[136] Both conflicts ultimately lead the legal interpreter to formulate a decision that is seen as "objectively just"[137] because of the subjective contextualised-normative evaluation.

The value of (the correct method of) legal interpretation is, therefore, very clear: given that, like any provisions, legal provisions only make sense as part of a delicate (yet powerful) performative/dispositive narrative, legal interpretation's performative capacity *decisively act*-ualises the regulative instances of our sociopolitical institutions. It makes them relevant by linking their performance to what renders us unique. What is increasingly lacking in our neorealist globalised constellation is exactly this *act*-ualisation which, I contend, cannot re-take place if what makes us human, namely the internal conflict between the

134. ESSER, *supra* note 45, at 133.
135. *See supra* note 47.
136. *Id*.
137. ESSER, *supra* note 45, at 136.

will power of affirmation or negation, is not re-affirmed. The more we cover the manifestation of this anthropological conflict, the more all mechanical forms of post-national governance will succeed in their dehumanising enterprise and displacing the jurist from view.

IV. CONCLUSION

The contention, so well demonstrated by Whorf,[138] that the structures of language determine those of thought is testament to the fact that language is the medium for human self-understanding or, as Heidegger would say, and Gadamer, Esser, and Agamben would all in their own ways confirm, that understanding *is* being(-in-*there*).[139] Consequently, as an *act* of meaning production, interpretation plays a pivotal role in the *present*-ification of our uniqueness, that is the *volo me velle*. It is in this sense that, in legal theory, legal interpretation is the canon of the process through which what makes us human (per-)forms its instances. Importantly, law being an ideal object in constant need of a "*corpus*" to show and prove its historical existence,[140] legal interpretation is the point of intersection between the *active* will of the jurist and law's normative presentification in ontological terms. This is why in the courtroom, as in the liturgical tradition, interpretative understanding leads to what Gadamer called the "third element in the hermeneutical problem,"[141] namely *application*, which is itself presentification.

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138. BRIAN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY (The MIT Press 2012) (1956).

139. Consider, in particular, Gadamer's argument that an "essential feature of the being in language [is] its I-lessness. Whoever speaks a language that no one understands does not speak," in Gadamer, *Man and Language*, *supra* note 117, at 65.

140. Siliquini-Cinelli, *The Age of "Depoliticization"*, *supra* note 1, and *Imago Veritas Falsa*, *supra* note 7.

141. GADAMER, TRUTH AND METHOD, *supra* note 84, at 318 and 338–50. *See also* AGAMBEN, TIME THAT REMAINS, *supra* note 62 at 79–85.

In light of the above discussion, I believe that the jurist may defeat the nihilism that currently affects him/her and return to the authority of which liberalism and its universalisation have deprived him/her only if we, as lawyers, re-affirm the neglected sovereignty of the will to (per-)form the self-understanding of our uniqueness through the affirmation or negation of a future project. The onto-sociopolitical need for the jurist's function to give a normative meaning to the signification of the power-to-will through legal interpretation can be re-discovered and successfully protected only if we first re-uncover the anthropological essence of *homo juridicus*'s self-consciousness and sovereign *activity* in existentially (per-)forming his/her decisions.

Arendt claimed that "the freedom of the will is relevant only to people who live outside political communities."[142] On the contrary, I believe that the very notion of our sociopolitical liberty is meaningless without recognition of the anthropological function of the sovereign power-to-will. This belief leads me to a subsequent suggestion. That recent public and private (household and corporate) financial crises have revealed an *a priori* and more profound political crisis is not a mystery. What is less clear, however, is that the politico-ideological gridlock that currently affects the decision-making processes of Western democracies[143] (consider, for instance, what has happened over the last few years in Greece, Portugal, Italy, and the U.S.) and that, not coincidentally, experimentalist forms of PNG aim to overcome, is rooted in the crisis of what makes us human: our will and power to decide both "for" and "against" a future project (and, thus,

142. ARENDT, 2 LIFE OF THE MIND, *supra* note 16, at 199. *See also* ARENDT, LIFE OF THE MIND, *supra* note 56, at 145, when it is claimed that political freedom "is the very opposite of 'inner freedom'". Not surprisingly, Arendt was of the opinion that Eichmann's evilness was "banal." *See* ARENDT, EICHMANN IN JERUSALEM, *supra* note 40.

143. Which was "forecasted" by Schmitt in THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., MIT Press 1988) (1923, 1926). *See also* CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer trans. & ed., Duke Univ. Press 2004) (1932, 1958).

something and/or someone) and then *actively* perform our volitions accordingly. Importantly, as I have argued here, such an *existential* crisis cannot be understood completely without a critique of the economic theory of democracy on the one hand and of liberalism's limits on the other (and in particular its utopian belief in the perpetual inclusive capacity of endless negotiations and in the possibility of freeing law from the metaphysic of the will). In particular, along with Rawls's dehumanised veil of ignorance, which should inform the contractual paradigm of reasonable political discourse, Habermas's belief that the "rational character of parliamentary deliberations is to be sought primarily . . . in the fair balancing of *interests*, the clarification of ethical self-understanding, and the moral justification of regulations" is one of the maximum expressions of liberalism's challenge to our uniqueness. This is so because it leads to the possibility of "subjectless forms" of communicative (non-)action that "regulate the flow of discursive opinion- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable."[144]

In the liquid and unstable post-national framework, the law is incapable of keeping its sociopolitical regulative promises. What is important is that we do not need it to keep these promises.[145] This is what, as mentioned in the introduction of this study, global (non-)law is about. The fact that, over the last ten years, soft-networked channels of PNG have branched out in new directions, sparking novel business models of rational *behaviour* that challenge the forms through which the politicisation and juridification of modernity have taken place, is anything but a coincidence. Gustav Radbruch's authoritarian claim that "[i]f nobody can ascertain what is just, somebody must determine what

144. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 3, at 180 and 301 respectively. Emphasis added.

145. *See supra* note 47.

shall be legal"[146] makes no sense in the post-national "constellation." This is so because the anthropological function of *positing* the law, which, in Arendt's words, is aimed at erecting "boundaries and establish[ing] channels of communication between men whose community is continually enlarged by the new men born into it,"[147] is deprived of its meaning. The promoters of soft-networked forms of PNG are used to claim that they may better overcome the political gridlocks and ideological clefts that characterise classic modes of regulation, and more importantly, prevent democratic systems of accountability from achieving the structural reforms they need. Although this claim sounds fascinating, I believe that the strategy by which liquid mechanisms of PNG operate and transcend state-based patterns of government can only be fully understood if we address why law's sociopolitical instances become completely obsolete within the global-order (non-)dimension. This can be done only if, in light of the aforementioned distinction between law and rule, we first comprehend that the dehumanised scenario is characterised by rules, not laws, that inform *behavioural* schemes of motion.

It is in this sense that the liberal global-order project threatens what makes us human—the agent-revealing *constitutive* force as expressed by the will's oscillation between *velle* and *nolle*, and, balancing that, the anthropological and sociopolitical role that this force has in the formation and protection of our self-consciousness. By imposing on us standardised apolitical schemes of inter-connected mechanical *behaviour*, the global *Oikoumene* targets the individual's power of assertion and denial as expressed by the will's power of affirmation and negation; this is (per-)formed through the boundlessness and unpredictability of (political) *action*. Arendt suggests that the "impossibility of foretelling" the consequences of human conduct finds its maximum expression in

146. GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 163 (Müller Jur.Vlg.C.F. 2011) (1969). *Also* quoted by HAYEK, *supra* note 23, at 212 and 323.

147. ARENDT, ORIGINS OF TOTALITARIANISM, *supra* note 6, at 465.

the *act* of making *promises* as "the only alternative to a mastery which relies on domination of one's self and rule over others;"[148] if she is right in that assertion, then the preference for the common law tradition expressed in the WTO's *Doing Business* reports[149]—that is, for a tradition in which promises are usually not legally binding[150]—becomes even clearer.

Unfortunately, given that "[t]he liberal will is fundamentally without content" and that "the end of liberalism is to create a form of public discourse in which [the differences in cultural norms] would have no significance,"[151] the totalising strategy of the liberal global-order project leads us to a sort of Deleuzian contemplative form of "immanent life" without knowledge. This is a pre-Adam-and-Eve contemplative condition in which the original λόγος mentioned by John 1:1 (which means both reason and speech) has no limit, or a Kantian dehumanised universe of harmonic reason and perfect (because mechanical) social coordination that transcends the imperfections and contradictions of our empirical world(s). This is what Agamben meant in claiming that "the planetary petty bourgeoisie is probably the form in which humanity is moving toward its own destruction."[152] Despite its aim of achieving a perfect rule-of-law-order away from the chaos and anarchy that affect the *homo homini lupus* condition of the state of nature, universalised liberalism produces instead a sort of "global Eden," or "intangible open" in which we do not have a sense of our living experience because we neither come to birth nor die as

148. ARENDT, HUMAN CONDITION, *supra* note 25, at 244.

149. I have investigated this preference further in Siliquini-Cinelli, *supra* note 1.

150. This general doctrine, along with its exceptions, are compellingly investigated by Martin Hogg in PROMISES AND CONTRACT LAW 428–50 (Cambridge Univ. Press 2011).

151. KAHN, LIBERALISM IN ITS PLACE, *supra* note 5, respectively at 16 and 33.

152. AGAMBEN, THE COMING COMMUNITY, *supra* note 6, at 65. Agamben, who as quoted compares the imperial trend of the global economy to that which characterises the Hell, further maintains that current "politics assume[s] . . . the form of an *iokonomia*, that is, of a governance of empty speech over bare life." *See* AGAMBEN, *id.* at 72.

"someone";[153] this is a sort of Kojèvean post-historical (that is, animal) condition in which not only miracles are exceptions, but even time and space, as well love and evil, happiness and suffering, violence and sacrifice, friend and enemy no longer exist, and in which everyone can be (and in fact, is) everyone else because its (non-)human participants are moved merely by incentives[154] according to quantitative (rather than qualitative) models of interest, and then evaluated and divided according to their *behavioural* virtues rather the decisions they make.

In such a (non-)dimension of *objective regularities* rather than of *subjective irregularities*, of language rather than languages,[155] of novels rather than tragedies, (non-)humans are completely interchangeable and replaceable (as is the case, not surprisingly, for the channels through which soft-networked forms of PNG operate) because their lives will no longer be *sacer*, and even the

153. The rationalistic and aspatial *ius soli* is already producing this result.

154. Habermas speaks of "stimulus-response behavior" in *On the Logic of Social Sciences* and of "impulses" throughout *Between Facts and Norms*. There are two reasons for this. First, Habermas believes that humans can define their own identities by rationally following their interests. Second, even if he tries to draw a fine line between "political public sphere" and "civil society" through a conception in which the latter "institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres" and which "can acquire influence in the public sphere," his notion of the public sphere underestimates, on the one hand, the (anthropological more than sociopolitical) distinction among private, public, and social realms so well-described by Arendt, and on the other hand, Hayek's warning against the instrumentalisation of the term "social." *See* HABERMAS, LOGIC OF SOCIAL SCIENCES, *supra* note 14, at 44, *and* BETWEEN FACTS AND NORMS, *supra* note 3, 329–87, at 367 and 373; ARENDT, HUMAN CONDITION, *supra* note 25, 22–78; HAYEK, *supra* note 23, at 241–43. *See also* JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW 262 (Cambridge Univ. Press 2014). *See also* Thomas Piketty's critique of the scientific methods used by modern economists in CAPITAL IN THE TWENTY-FIRST CENTURY 574–75 (Arthur Goldhammer trans., Belknap Press 2013) (2014). Finally, *see supra* note 50-52.

155. I refer here to when Habermas, borrowing from theologico-philosophical inquiry, claims that "[o]nly by destroying the particularities of *languages* . . . does reason live in *language*." HABERMAS, LOGIC OF SOCIAL SCIENCES, *supra* note 14, at 144.

It seems, then, that liberalism's linguistic sin is that it has never understood that "a word [is not] an instrument, like the language of mathematics, that can construct an objectified universe of beings that can be out at our disposal by calculation." *See* GADAMER, TRUTH AND METHOD, *supra* note 84, at 473. *See also supra* note 94.

act of killing will lose its political and normative meaning and become a sterile and neutral *behavioural* outcome (as it already is, not coincidentally, in criminal law every time the *mens rea* is displaced from view).[156] This is why, from claiming to be the only feasible solution to the sociopolitical challenge posed by cultural pluralism, universalised liberalism has imposed a form-of-(non-)living in Agambenian terms which in fact annihilates our uniqueness through the imposition of *procedural* rather than *substantial* truths which, paraphrasing Nietzsche, we may say forces humans to place "[their] behaviour under the control of abstractions."[157] Thus the liberal global-order project requires us to master the problem of law in its original structure, in the *connubium* between its *essential* uncanny presence and *existential* performative instances. This cannot be done without asking why, building on Benjamin, Agamben argues that in an age such as ours, in which the exception has become the rule, instead of claiming that "there is nothing outside the law" we should rather understand that "there is nothing inside the law."[158]

The lesson to be learnt then is that, if we agree with Agamben when he observes that "[i]t is, in every being that exists, the possibility of not-being that silently calls for our help,"[159] then we

156. This is so because the co-essential possibility of being killed would be seen as an existentially tolerable condition. Heidegger would say that the "merely-living," as opposed to *Dasein* as "Being-in-the-world" or "Being-the-*there*" or "Being-in-*motion*," does not die, but just ceases to live. On this, *see* Agamben, *Language and Death*, *supra* note 94.

157. Friedrich Nietzsche, *On Truth and Lies in the Nonmoral Sense* in PHILOSOPHY AND TRUTH 84 (Daniel Breazeale trans., Humanities Press 1990) (1873). David Dyzenhaus suggests that "political liberalism . . . seeks to ban truth from politics," in *supra* note 5, at 231.

158. AGAMBEN, TIME THAT REMAINS, *supra* note 62, at 170. "The entire planet," Agamben further maintains, "has now become the exception that law must contain in its ban," *id*. *See also* AGAMBEN, THE COMING COMMUNITY, *supra* note 6, at 113.

159. AGAMBEN, THE COMING COMMUNITY, *supra* note 6, at 31. In light of what was discussed in Section II, it is of pivotal interest that Agamben believes that this need for help finds its maximum expression in the artist, that is in the creator *par excellence*. The artist, Agamben claims, is he who "remains on [the] side of himself [because] condemned forever to dwell, so to speak, beside his reality." Hence, the artist is the real "man without content, who has no identity

should say that, as lawyers, we have the precise duty to do our part not only in understanding why this help is required, but also in providing it. The central question is, of course, how. In my opinion, the best way to meet this challenge is by uncovering the connection between the existential component of *jus-dicere* and, paraphrasing Thomas Aquinas, the anthropological and sociopolitical essence of the *voluntas vult se velle et nolle*, that is, of the "will which wills itself to will and nill." The combination of the two creates a powerful zone of indistinction within legal theory, namely the unity of consciousness.

This can be achieved only through the promotion of a call for *action*, which implies a "narrative of the subject, an account of the deliberative process by which the subject chose and thus of the values and principles which he affirmed in that process."[160] Yet, as Arendt taught us, action cannot be built on contemplation. Hence, if legal texts are central to the operativity of the (rule of) law, and if we agree with Gadamer that "[a] person who is trying to understand a text is always projecting"[161] and with Esser's account of the role of the *act*-ualising decision in the interpretative task, then we should admit that the performative character of legal interpretation as described in this paper depends upon the *restitutio in integrum* of the will as *principium individuationis*. As this paper has shown, this 'will' ought not be confused with the liberal prototype, which as Kahn as set out, is "fundamentally without

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[other] than a perpetual emerging out of the nothingness of expression and no other ground than this incomprehensible station on this side of himself." AGAMBEN, MAN WITHOUT CONTENT, *supra* note 71, at 55. *See also* AGAMBEN, *The Author as Gesture* in THE COMING COMMUNITY, *supra* note 6, at 61–72.

160. KAHN, OUT OF EDEN, *supra* note 40, at 46. *See also* KAHN, POLITICAL THEORY, *supra* note 41, at 125–52. Kahn has introduced the need for a normative inquiry into the process of self-exploration in THE CULTURAL STUDY OF LAW (Univ. of Chicago Press 1999).

161. GADAMER, TRUTH AND METHOD, *supra* note 84, at 279. *See also* ARENDT, CRISES OF THE REPUBLIC, *supra* note 57, in which it is explained why the ability to act requires *imagination*.

content";[162] rather the will we should put back on stage is the faculty through which we *actively* choose the determination(s) of a future project while setting into motion the *constitutive* process of our uniqueness.

162. KAHN, PUTTING LIBERALISM IN ITS PLACE, *supra* note 5, at 16.